No. 9797.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

National Reserve Insurance Company of Illinois, a corporation, and Dubuque Fire and Marine Insurance Company of Dubuque, Iowa, a corporation,

Appellants,

vs.

Robert B. Ord and Minnie May Ord, doing business under the fictitious firm name and style of Community Ice Co.,

Appellees.

APPELLANTS' BRIEF.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

FILED

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TOPICAL INDEX.

PAGE

Statement of pleadings and facts disclosing District Court jurisdiction and jurisdiction of Circuit Court of Appeals to review the judgment 1

Statement of the case 2

Specification of errors 6

Argument of the case 11

The occupancy warranty 11

The standard policy vacancy clause 15

The standard policy unoccupancy clause 16

The standard policy increase of hazard clause 21

The standard policy concealment clause 22

TABLE OF AUTHORITIES CITED.

Cases. PAGE

Aiple v. Boston Ins. Co., 100 N. W. 8; 92 Minn. 337 14
Allen v. Home Ins. Co., 133 Cal. 29; 65 Pac. 138 14
Arnold v. American Ins. Co., 148 Cal. 660; 84 Pac. 182 12
Baker v. German Fire Ins. Co., 24 N. E. 1041; 124 Ind. 490 14
Bowditch v. Norwich Union etc. Soc., 79 N. E. 788; 193 Mass. 565 14
Boyd v. Vanderbilt Ins. Co., 16 S. W. 470; 90 Tenn. 212 14
Brehm Lumber Co. v. Svea Ins. Co., 79 Pac. 34; 36 Wash. 520 20
Conn. Fire Ins. v. Buchanan, 141 Fed. 877 .... 14, 15
Continental etc. v. Kyle, 24 N. E. 727, 730; 124 Ind. 132 15
Davenport v. Firemen's Ins. Co., 199 N. W. 203; 47 S. D. 426 22
Davis-Scofield Co. v. Agricultural Ins. Co., 145 Atl. 38; 109 Conn. 673 23
Dewees v. Manhattan Ins. Co., 35 N. J. L. 366 14
England, et al. v. Westchester Fire Ins. Co., 51 N. W. 954; 81 Wis. 583 16
Franklin Fire Ins. Co. v. Martin, 40 N. J. L. 568-572 14
General Accident Ins. Corp. v. Industrial Acc. Comm., 196 Cal. 179, 237 Pac. 33 23
Girard F. & M. Ins. Co. v. Scott, 251 N. W. 314; 265 Mich. 293 22
Goddard v. Ins. Co., 108 Mass. 56 14
Greenwich Ins. Co. v. Dougherty, 42 Atl. 485; 64 N. J. L. 716 14
Halpin v. Phenix Ins. Co., 23 N. E. 482, 484; 118 N. Y. 165 15
Hernor Co. v. Superior Fire Ins. Co., 39 Fed. (2d) 477 .... 16, 18
Home Ins. Co. v. Boyd, 49 N. E. 285; 19 Ind. 173 15
Home Ins. Co. v. Currie, 54 Fed. (2d) 204 14
Insurance Co. v. Cherry, 3 S. E. 876; 84 Va. 72 15
Jelin v. Home Ins. Co., 72 Fed. (2d) 326 18

PAGE

Limburg v. German Fire Ins. Co., 57 N. W. 626; 90 Iowa 709.. 15

Liverpool & London & Globe Ins. Co. v. Gunther, 116 U. S. 112; 29 L. Ed. 575 19

Maher v. Hibernia Ins. Co., 67 N. Y. 283 14

Mawhinney v. Southern Ins. Co., 98 Cal. 184; 32 Pac. 945 14

Miller v. Security Ins. Co., 131 Cal. App. 217; 21 Pac. (2d) 659 .... 14, 23

Montello v. Manhattan F. & M. Ins. Co., 294 N. Y. S. 1015 22

Moore v. Ins. Co., 6 Atl. 27; 64 N. H. 140 15

Parmalee v. Hoffman Fire Ins. Co., 54 N. Y. 193 14

Patriotic Ins. Co. v. Franciscus, 55 Fed. (2d) 844 14

Queen Ins. Co. v. Cummins, 267 S. W. 144; 206 Ky. 300 23

Ranspach v. Teutonia Fire Ins. Co., 67 N. W. 967; 109 Mich. 699 16

Salley v. Western Mut. Fire Ins. Co., 181 S. E. 74; 177 S. C. 168 22

Sexton v. Hawkeye Ins. Co., 28 N. W. 462; 69 Iowa 99 15

Slinkard v. Manchester Fire Assur. Co., 122 Cal. 595; 55 Pac. 417 14

St. Paul Fire & Marine Ins. Co. v. Bachman, 285 U. S. 112; 76 L. Ed. 648 17

St. Paul Fire & Marine Ins. Co. v. Balfour, 168 Fed. 212 (9th Ct.) 23

Steil v. Sun Ins. Office of London, 171 Cal. 795; 155 Pac. 72.... 14

Sternberg v. Merchants Fire Assur. Corp., 6 Fed. Supp. 541.... 15

Thomas v. Commercial Union Assur. Co., 37 N. E. 672; 162 Mass. 29 14

Thomas v. Hartford Fire Ins. Co., 56 S. W. 264; 21 Ky. Law. Rep. 1139 16

Walker v. Mechanics Ins. Co., 119 Cal. App. 243; 6 Pac. (2d) 355 14

PAGE

Wall v. East River Mutual Ins. Co., 7 N. Y. 372 14

Westchester Fire Ins. Co. v. Fitzpatrick, 2 Fed. (2d) 651 22

Williams v. Pioneer Ins. Co., 171 N. Y. Supp. 353 15

Statutes.

Insurance Code, Secs. 330, 331, 332, 333, 334 22

Judicial Code: Sections 28 U.S.C.A. 71; 28 U.S.C.A. 230 2

Textbooks.

2nd Clement on Fire Insurance, 59 13

2nd Clement on Fire Insurance, 61 14

2nd Cooley on Insurance, 1287 14

No. 9797.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL RESERVE INSURANCE COMPANY OF ILLINOIS, a corporation, and DUBUQUE FIRE AND MARINE INSURANCE COMPANY OF DUBUQUE, IOWA, a corporation,

Appellants,

vs.

ROBERT B. ORD and MINNIE MAY ORD, doing business under the fictitious firm name and style of COMMUNITY ICE CO.,

Appellees.

APPELLANTS' BRIEF.

Statement of Pleadings and Facts Disclosing District Court Jurisdiction and Jurisdiction of Circuit Court of Appeals to Review the Judgment.

This is a suit by Robert B. Ord and Minnie May Ord, doing business as Community Ice Co., plaintiffs, against National Reserve Insurance Company of Illinois, a corporation, and Dubuque Fire and Marine Insurance Company of Dubuque, Iowa, a corporation. Plaintiffs are and were each citizens and residents of the State of California, and defendant, National Reserve Insurance Company of Illinois, a citizen and resident of the State of Illinois,

and defendant, Dubuque Fire and Marine Insurance Company of Dubuque, Iowa, a citizen and resident of the State of Iowa, and both defendants are non-residents of the State of California, and the amount in controversy exceeds three thousand dollars, exclusive of interest and costs.

Action was commenced in the Superior Court of the State of California, in and for the County of Los Angeles. [Tr. pp. 2-6, fols. 1-5.] Defendants, by petition, removed the action to the District Court of the United States, for the Southern District of California, Central Division. [Tr. pp. 7-13, fols. 5-17.]

Judgment was entered for plaintiffs and defendants appealed to this court. [Tr. p. 32, fol. 37.]

See:

> *Judicial Code;* Sec. 28 U. S. C. A. 71; 28 U. S. C A., Sec. 230.

Statement of the Case.

This suit is an action upon a California Standard form Fire Insurance Policy. The policy was executed on June 22, 1937, by the defendants, insuring plaintiffs, and others (eliminated by agreement) against loss by fire to an amount not exceeding $5,000.00 for a period of three years, as follows:

> "On the one story composition roof frame buliding and its additions, if any, of like construction communicating and in contact therewith, while occupied only for Packing Plant purposes." [Tr. pp. 40-41.]

On July 15, 1939, the property described was destroyed by fire with damage agreed and found by the court of $4,079.65. [Tr. p. 28, fol. 33; Finding XI.]

Defendants denied liability and defend this action on the following grounds:

1. There was a breach of the occupancy warranty in the policy. The policy provides insurance on the "one story composition roof frame building and its additions, if any, of like construction, communicating and in contact therewith, while occupied only for Packing Plant purposes." [Tr. p. 41.] At the time of the fire the building was not occupied only for packing plant purposes, or for any purpose, but was vacant and unoccupied. [Finding XIII, Tr. p. 28, fol. 33.]

2. The Standard Fire Policy provides that:

> "Unless otherwise provided by agreement endorsed hereon or added hereto, this company shall not be liable for loss or damage occurring while the building herein described, whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of ten (10) consecutive days." [Tr. p. 59.]

The property at the time of the fire was vacant and had so remained for more than two weeks prior to the fire. [Finding XIII, Tr. p. 28, fol. 33.]

3. The building described was unoccupied at the time of the fire and had so remained for more than two weeks prior thereto. [Finding XIII, Tr. p. 28, fol. 33.]

4. The policy provided that:

> "This entire policy shall be void if the insured has concealed or misrepresented any material facts or circumstances concerning this insurance or the subject thereof." [Plaintiffs' Exhibit A, Tr. p. 57.]

The evidence shows without dispute that from 1936 until the time of the fire said packing plant was shut down and ceased to be operated as a packing plant or occupied for any purpose and became dilapidated and decreased in value until it was destroyed by fire. That during said time the majority of the machinery used for packing plant purposes was stolen and carried away, including most of the motors used in the plant, all electrical connections were detached and discontinued, all doors were boarded up except one, tramps gained access to the premises by lifting off the siding boards of the building and made the place a rendezvous, lighting fires under the building, drinking whiskey and littering the place with papers and other combustible materials; that no watchman or caretaker was employed to look after said property and no repairs were made thereon after February 2, 1936, and according to the plaintiffs' conclusion, the fire was the result of the use and occupancy of the building by tramps; that more than two weeks before the fire, plaintiffs removed all of the packing plant equipment that had not been stolen or carried away from the building and stored it in a shed in the City of Fullerton; that at the time of the fire, the building was wholly vacant and unoccupied and had so remained for more than two weeks prior to

the fire. The testimony further showed that children would come in and "steal the stuff and take it away from the building, break down the building, come in and take the equipment." The reason that plaintiffs removed the property from the building was so that they would have something when the lease that they were operating under had expired. The machinery had been installed in the plant for the purpose of operating it as an operating shed. [Tr. pp. 77-86.]

5. The policy provided:

> "Unless otherwise provided by agreement endorsed hereon or added hereto, this company shall not be liable for loss or damage occurring while the hazard be materially increased by any means within the control of the insured."

By reason of the facts set forth in the foregoing subparagraph No. 4, defendants claim that the hazard was materially increased by means within the control of the insured. [Finding XIII, Tr. p. 28, fol. 33.]

All of the testimony regarding the questions involved on this appeal, except the written documents, was by statements of the two plaintiffs, which statements were introducd as their testimony. [Tr. p. 87.] No question was or will be raised regarding the execution and delivery of the policy, the fire, the amount of damage or the performance by the plaintiffs of the conditions to be performed subsequent to the fire.

Specification of Errors.

I.

The court erred in making Finding of Fact No. V that: "at the time of the fire said policy was in full force and effect."

This finding was general and the particular error therein will be noted in the subsequent specifications pointing out wherein the said policy was avoided and not in full force and effect at the time of the fire.

II.

The court erred in making Finding of Fact No. VII. [Tr. p. 27, fol. 32.]

This is a blanket finding that each and all of the allegations contained in plaintiffs' complaint are true and correct, and the particulars wherein said finding was erroneous will be pointed out in the subsequent specifications.

III.

The court erred in making Finding of Fact No. IX. [Tr. p. 27, fol. 32.]

This finding embodies nothing but a conclusion of law and is to the effect that the endorsement on the policy reading: "permission is hereby granted to shut down or cease operations as the occasion may require during the life of the policy," is very comprehensive and the court apparently applied this endorsement to every condition of the policy. As will be pointed out in argument, this permissive endorsement related to and was intended to modify the clause appearing in the policy under the heading of "Matters Suspending Insurance" [Plaintiffs' Exhibit A, Tr. p. 58], which provided as follows:

"Unless otherwise provided by agreement endorsed hereon or added hereto, this company shall not be liable for loss or damage occurring * * * (b) if the subject of insurance be a manufacturing establishment, while it is operated in whole or in part at night later than 10 o'clock or while it ceases to be operated beyond a period of 10 consecutive days."

The permissive clause cannot reasonably be construed to waive the clause providing against vacancy or the clause providing against unoccupancy or the clause relating to concealment of material facts, or the clause regarding increase of hazard, or the warranty to insure only while occupied for packing plant purposes.

IV.

The court erred in making Finding of Fact No. X. [Tr. p. 27, fol. 33.]

This finding is erroneous in that the court finds that there is no persuasive testimony that the closing or shutting down of the packing plant increased any of the hazards, and that there is nothing to indicate that the conditions of the plant at the time of the fire or preceding it was endangered in any way by reason of the closing, and that the endorsement does not limit the closing so as to restrict liability to increase of moral hazard. This is a finding on the question of increase of hazard, and the evidence is undisputed that the closing down of the plant, the vacancy and the unoccupancy of the plant did increase the hazard, both physical and moral. The testimony is undisputed that during this period the machinery was being stolen [Tr. p. 78]; that "children would come in and steal the stuff away from the plant, break down the building and come in and take equipment" [Tr. p. 80];

that although there was only one door that had a key and the rest of the doors were nailed up, tramps would loosen the outside wall of the building and crawl in by pulling off a board and sneaking under [Tr. p. 85]; that tramps would go under the building, spread out papers, have a drink and lay there and build a fire under the building; that it was the opinion of plaintiff, Robert B. Ord, that the fire was started by tramps. [Tr. p. 86.]

All this certainly constituted both an increase in moral as well as physical hazard, as will be demonstrated in the argument of the case.

V.

The court erred in making its Finding of Fact No. XV [Tr. p. 28], that it is not true that the policy of insurance insures the plaintiffs while occupied only for packing plant purposes.

This finding is clearly erroneous. The policy specifically provides [Plaintiffs' Exhibit A, Tr. pp. 40-41] insurance:

> "to the following described property while located and contained as described herein, and not elsewhere, to-wit: * * * On the following described property all only while situate 1245 Jackson Street, Hines, California.
>
> "1. $5,000.00 on one-story composition roof frame building and its additions (if any) of like construction communicating and in contact therewith, while occupied only for Packing Plant purposes, * * *"

VI.

The court erred in making its Finding of Fact No. XVI to the effect that it is not true that the policy of insurance was void at the time of the fire. [Tr. p. 29.]

This is a general finding and erroneous as more specifically pointed out in Specifications of Error Nos. IV

and VII, wherein it is pointed out that the policy was void by reason of the concealments by plaintiffs, and suspended by reason of the breach of the occupancy warranty, increase of hazard, vacancy for a period of more than ten days preceding the fire, and unoccupancy for a period of more than ten days preceding the fire.

VII.

The court erred in making its Finding of Fact No. XVII to the effect that it was not true that the hazard to the risk insured by the policy was materially increased within the knowledge and control of plaintiffs, and each of them.

The policy provides [Tr. p. 58] under "Matters Suspending Insurance," as follows:

> "Unless otherwise provided by agreement endorsed hereon or added hereto, this company shall not be liable for loss or damage occurring while the hazard be materially increased by any means within the control of the insured."

As shown by the undisputed testimony summarized under Specification of Error No. IV, the hazard, both physical and moral, was materially increased by means within the control of the insured. The insured testified that he visited the place every day or every few days [Tr. p. 82], but did nothing to eliminate these extremely hazardous conditions.

VIII.

The court erred in failing and refusing to make a finding on defendants' first, separate and affirmative defense to plaintiffs' complaint [Tr. p. 15, fol. 19] to the effect that plaintiffs concealed material facts and circumstances concerning the insurance and the subject thereof. There was no finding on this defense and, as will be demonstrated in the argument, plaintiffs were under a continu-

ing duty to inform defendants of the facts and circumstances as summarized under Specification of Error No. IV.

IX.

The court erred in its conclusion of law that at the time of the destruction of the building described in the policy, the policy was in full force and effect and that plaintiffs were entitled to judgment against defendants, and each of them [Tr. p. 29, fol. 34], for the reason that by the court's own findings, at the time of the fire the building was not used for packing plant purposes as warranted in the policy, and was vacant and was unoccupied. [Finding XIII, Tr. p. 28, fol. 33.] And for the further reason that by the undisputed testimony, plaintiffs concealed from defendants material facts and circumstances concerning the insurance and the hazard was increased by means within the knowledge and control of plaintiffs, and each of them.

X.

The court erred in failing to make conclusions of law in favor of defendants for the reasons set forth in the preceding Specification No. IX.

XI.

The court erred in entering judgment for plaintiffs [Tr. pp. 30-31, fols. 35-36], for the same reasons that the court erred in making conclusions of law in favor of plaintiffs as set forth in Specification No. IX.

XII.

The court erred in failing to make findings and conclusions in favor of defendants and in failing to enter judgment for defendants for the reasons set forth in Specification No. IX.

ARGUMENT OF THE CASE.

Summary.

Since in this case there was no testimony and no claim or suggestion that the contract of insurance sued upon was changed, modified or any of its terms waived in any other manner than as appears in the written instrument itself, and since all the questions on appeal revolve around the interpretation and application of these several clauses of the policy, we believe it would be helpful to make the argument under the heading of the several clauses of the policy contract involved, summarized as follows:

A. THE OCCUPANCY WARRANTY.

B. THE STANDARD POLICY VACANCY CLAUSE.

C. THE STANDARD POLICY UNOCCUPANCY CLAUSE.

D. THE STANDARD POLICY INCREASE OF HAZARD CLAUSE.

E. THE STANDARD POLICY CONCEALMENT CLAUSE.

The Occupancy Warranty.

This clause appears at the beginning of the policy [Plaintiffs' Exhibit A, Tr. pp. 40-41] and is an integral part of the insuring clause itself. The policy provides that the defendants insure plaintiffs for the period mentioned against loss or damage by fire except as thereinafter mentioned

> "to an amount not exceeding $6,000.00 to the following described property, while located as described herein and not elsewhere, to-wit: * * *
>
> "On the following described property all only while situate 1245 Jackson Street, Hines, California.

> "1. $5,000.00.
>
> "On the one story composition roof frame building and its additions (if any) of like construction communicating and in contact therewith while occupied only for Packing Plant purposes. * * *"

In this jurisdiction it is settled beyond question that where the policy provides that it insures only while occupied for a particular purpose, that the proof that the property insured was so occupied at the time of the fire goes to the very essence of plaintiffs' right to recover, and where, as here, the proof shows without question, and the court so found [Findings XIII, Tr. p. 28, fol. 33], that at the time of the fire the building was vacant and had not been used for packing plant purposes or any other purpose for more than two weeks prior to the fire, the plaintiff has failed in an essential element of his case and cannot recover. As said in the case of:

Arnold v. American Insurance Co., 148 Cal. 660,

wherein the policy was on "one story frame building * * * while occupied as a dwelling":

> "The complaint nowhere alleged that at the time of any of these fires either house was occupied as a dwelling house.
>
> "That such allegations were essential to the statement of a cause of action is very clear * * *. As to the question of the insufficiency of the amended complaint, it is unnecessary to do more than to refer to the case of Allen v. Home Ins. Co., 133 Cal. 29 (65 Pac. 138), where, as here, the policy covered a building 'while occupied as a dwelling house,' and where the demurrer interposed did not specify this particular objection. This court there said: 'The principal contention under this head is that the com-

plaint does not allege that the building, at the time of the fire was occupied as a dwelling house. It was in the contract between the insurer and the insured, that the premises were insured while occupied as a dwelling house. It was essential for plaintiff to prove that the fire occurred while the premises were occupied as such dwelling house. If it was essential to prove such fact, it was essential to allege it. * * * The allegation was not merely a condition precedent, as referred to in section 457 of the Code of Civil Procedure. It went to the very essence of plaintiff's right to recover. * * * The insurer was not liable upon the policies at all, except upon proof that the loss occurred within the terms of the policy. It was therefore essential to the statement of any cause of action that a loss within the terms of the policy should be alleged. That the houses were occupied as dwelling houses at the time of the fires, and that the furniture was at such time contained in the specified house, were essential to any liability on the part of defendant, and therefore essential to the statement of a cause of action. * * * The complaint lacked essential and necessary allegations in a case of this character, and was fatally defective. * * *

"Such a defect is not cured by verdict and judgment, even in the absence of any objection by demurrer or answer in the lower court, and objection made on account thereof may be made at any time."

Again in 2nd *Clement on Fire Insurance,* 59, the author said:

"Specific exact statement or description of certain situation, condition, use or occupation relating to the risk amounts to a warranty that the building is so situated, is occupied. or so occupied, or so used." (Citing many authorities.)

And see the following cases, all to the same effect:

Patriotic Ins. Co. v. Franciscus, 55 Fed. (2d) 844;
Allen v. Home Ins. Co., 133 Cal. 29; 65 Pac. 138;
Home Ins. Co. v. Currie, 54 Fed. (2d) 204;
Steil v. Sun Ins. Office of London, 171 Cal. 795;
Walker v. Mechanics Ins. Co., 119 Cal. App. 243;
Miller v. Security Ins. Co., 131 Cal. App. 217;
Mawhinney v. Southern Ins. Co., 98 Cal. 184;
Slinkard v. Manchester Fire Assur. Co., 122 Cal. 595;
Boyd v. Vanderbilt Insurance Co., 16 S. W. 470 (Tenn.);
Dewees v. Manhattan Insurance Co., 35 N. J. Law. 366;
Franklin Fire Insurance Co. v. Martin, 40 N. J. Law. 568-572;
Connecticut Fire Insurance Co. v. Buchanan, 141 Fed. 877;
Aiple v. Boston Insurance Co. (Minn.), 100 N. W. 8;
Thomas v. Commercial Union Assur. Co. (Mass.), 37 N. E. 672;
Baker v. German Fire Ins. Co. (Ind.), 24 N. E. 1041;
Bowditch v. Norwich Union etc. Society (Mass.), 79 N. E. 788;
Goddard v. Insurance Company, 108 Mass. 56;
Wall v. The East River Mutual Ins. Co., 7 N. Y. 372;
Maher v. Hibernia Ins. Co., 67 N. Y. 283;
Parmelee v. Hoffman Fire Ins. Co., 54 N. Y. 193;
Greenwich Ins. Co. v. Dougherty, 42 Atl. 485 (N. J.)
2d *Cooley on Insurance*, p. 1287;
2d *Clement on Insurance*, p. 61.

The Standard Policy Vacancy Clause.

The policy sued upon provides as follows:

> "Unless otherwise provided by agreement endorsed hereon or added hereto, this Company shall not be liable for loss or damage occurring * * * (f) while a building herein described, whether intended for occupation by owner or tenant, is vacant or unoccupied beyond the period of 10 consecutive days." [Plaintiffs' Exhibit A, Tr. pp. 58-59.]

There is no question but that this property was vacant at the time of the fire and had been vacant for a long time prior thereto. The court found specifically that the machinery and all other personal property installed within the plant was removed from the building more than two weeks preceding the fire and that at the time the building was destroyed by fire, no machinery or other personal property was within the building. [Tr. p. 28, fol. 33.]

There was no endorsement providing otherwise upon the policy.

That such a clause is valid and must be enforced, see:

Sternberg v. Merchants Fire Assur. Corp., 6 Fed. Supp. 541;
Conn. Fire Ins. v. Buchanan, 141 Fed. 877;
Home Ins. Co. v. Boyd, 49 N. E. 285;
Limburg v. German Fire Ins. Co., 57 N. W. 629 (Iowa);
Moore v. Ins. Co., 6 Atl. 27 (N. H.);
Halpin v. Phoenix Ins. Co., 23 N. E. 482, 484 (N. Y.);
Sexton v. Hawkeye Ins. Co., 28 N. W. 462 (Iowa);
Continental etc. v. Kyle, 24 N. E. 727, 730 (N. Y.);
Williams v. Pioneer Ins. Co., 171 N. Y. Supp. 353;
Insurance Co. v. Cherry, 3 S. E. 876 (Va.).

The Standard Policy Unoccupancy Clause.

It will be noted from the quotation of the Standard Policy Provision in the foregoing discussion that the policy provides against vacancy or unoccupancy in the disjunctive. If the property is either vacant *or* unoccupied beyond the period of 10 consecutive days, the insurance is suspended during that period.

The court specifically found that at the time of the fire the building had not been used for packing plant purposes or any other purposes for more than two weeks prior to the fire. [Tr. p. 28, fol. 34.]

The property might become either vacant or it might become unoccupied, or it might become both. In any of the events, the policy is suspended during the period of such vacancy, or unoccupancy, or vacancy and unoccupancy.

See cases cited, *supra*; also:

> *Hernor Co. v. Superior Fire Ins. Co.,* 39 Fed. (2d) 477;
>
> *Ranspach v. Teutonia Fire Ins. Co.,* 67 N. W. 967 (Mich.);
>
> *England, et al. v. Westchester Fire Ins. Co.*, 51 N. W. 954;
>
> *Thomas v. Hartford Fire Ins. Co.,* 56 S. W. 264.

Summarizing the discussion of the three clauses foregoing, to-wit: the Occupancy Warranty, the Vacancy Clause and the Unoccupancy Clause, it is clear that each of these clauses are independant of the other and that each was violated by the assured, and that there were no endorsements or agreements providing otherwise upon the policy. The trial court obviously construed the endorse-

ment providing "permission is hereby granted to shut down or cease operations as the occasion may require during the life of this policy" [Plaintiffs' Exhibit A, Tr. p. 53], as being all-embracing and waiving not only the clause it was intended to modify, but the occupancy warranty, the vacancy clause and the unoccupancy clause as well. That this construction is not warranted is evident from the language of the clause itself, as well as of the other cause of the policy which it obviously was intended to modify. The clause that was intended to be modified by this clause is clearly the clause relating to the shutdown of a manufacturing establishment, which this packing plant was. This is the standard policy clause, which provides as follows:

> "Unless otherwise provided by agreement endorsed hereon or added hereto, this Company shall not be liable for loss or damage occurring * * * (b) if the subject of insurance be a manufacturing establishment, while it is operating in whole or in part at night later than 10 o'clock, or while it ceases to be operated beyond the period of 10 consecutive days." [Plaintiffs' Exhibit A, Tr. p. 58.]

This is the only clause in the policy relating to shutdown or cease operations, and the endorsement grants permission to cease operations "as the occasion may require" could apply only to this clause.

In the case of:

> *St. Paul Fire & Marine Ins. Co. v. Bachman,* 285 U. S. 112, 76 L. Ed. 648,

the court held that although the increase of hazard warranty had been waived by endorsement, the giving of this endorsement did not waive the keeping of prohibited

articles warranty, even though the same facts established a violation of both warranties.

In the case of:

Hernor v. Superior Fire Ins. Co., 39 Fed. (2d) 477,

the court held that the granting of permission to remain vacant for a period of not exceeding nine consecutive months in any one policy year in addition to ten days permitted by the policy, was not inconsistent with the occupancy clause to the condition of the building at the date of the issuance of the policy, and that both clauses should be given their full effect.

In the case of:

Jelin v. Home Ins. Co., 72 Fed. (2d) 326,

the question involved in this case was whether an endorsement placed upon the policy waiving vacancy for a period of sixty days and unoccupancy for not exceeding eight months in any one year the property became vacant and remained so for over a period, and the fire occurred shortly after that period but before the expiration of the eight months allowed by the unoccupancy clause. The property also was unoccupied, and the question involved was whether the rider of the occupancy clause did not waive the vacancy clause. The court held the contrary, and said:

> "As we construe the terms of the rider, it enlarged the rights of the insured by permitting enumerated exceptions, which, but for the benefit of the rider, would have made the policy void. The first exception relates to the employment of mechanics; the second to the use of volatile substances for domestic purposes; the third to the use of gas, electricity,

or kerosene oil for certain purposes; the fourth to the use of enumerated means for heating; the fifth to the privilege of remaining vacant for a period not exceeding sixty consecutive days at any one time; the sixth to the privilege of remaining unoccupied for a period not exceeding eight consecutive months in any one year; the seventh to carry other insurance. Nowhere do we find in the rider an expressed intention of the parties that the insurer was to be free from liability only if the insured premises were vacant for more than sixty consecutive days and unoccupied for more than eight consecutive months. We think that the exceeding of any one of the privileges enumerated as exceptions in this clause would be sufficient to void the policy. So if benzine were kept upon the premises for other than domestic purposes or kerosene oil were stored upon the premises for purposes of sale, the privilege granted by the rider would have been exceeded and the policy would thereupon become void. In the instant case it is uncontradicted that the appellant permitted the premises to remain vacant for more than the sixty days allowed in the rider. We conclude that the learned trial court was not in error in directing a verdict for the appellee."

Same case, lower court, 5 Fed. Supp. 908.

In the case of:

Liverpool and London and Globe Ins. Co. v. Gunther, 116 U. S. 112, 29 L. Ed. 575,

the court held that the privilege endorsed on the policy to use gasoline gas, gasometer, blower and generator being underground about sixty feet from main building, in vault; no heat employed in process did not sanction the

keeping, using or storing of gasoline or its equivalent, burning fluid or oil, except for the actual use in that gas apparatus.

An examination of this entire policy shows clearly that it was intended by the parties to cover a going concern, a plant that could and would be subject to shut-downs as the occasion might require, and the endorsed permission to shut down was in contemplation of such a situation. In the case of:

> *Brehm Lumber Co. v. Svea Ins. Co.*, 79 Pac. 34 (Wash.),

the court said:

> "We think the words used in the policy must be given the ordinary meaning when considered in relation to the subject matter covered by the policy. The insurance was upon a manufacturing plant, and the words 'shut down,' as commonly used in relation to such plants, refer to the stopping of the machinery and the mechanism in general by which the manufacture is effected. The word 'idle' is likewise used with the same significance."

The very fact of granting permission to shut down indicates a clear intent that the insurance is on a going concern. How, therefore, can it be contended that because permission was granted to shut down a going concern "as the occasion might require" that by so doing, the defendants waived the other conditions of the policy provided for their protection?

The Standard Policy Increase of Hazard Clause.

The policy provides:

> "Unless otherwise provided by agreement endorsed hereon or added hereto, this company shall not be liable for loss or damage occurring (a) while the hazard be materially increased by any means within the control of the insured." [Plaintiffs' Exhibit A, Tr. p. 58.]

This clause is so clear that citation should not be necessary for its application. Clearly the hazard of this property to loss by fire had been increased at the time of the fire. The court found that at the time of the fire, and for more than two weeks preceding, the building was vacant and had not been used for packing plant purposes or any other purpose for more than two weeks prior to the fire. [Finding XIII, Tr. p. 28, fols. 33-34.]

The evidence by plaintiffs' own admission shows without dispute that the closing down of the plant, the vacancy and unoccupancy of the plant greatly increased the hazard, both physical and moral; that during the period of shut-down most of the machinery was stolen [Tr. p. 78]; that "children came in and stole stuff away from the plant, broke down the building and took away equipment" [Tr. p. 80]; that tramps would loosen the outside walls of the building and crawl into the building [Tr. p. 85]; and go under the building, spread out papers, drink, lay there and build fires under the building, and in the opinion of plaintiff, Robert B. Ord, the fire was started by tramps while so engaged. [Tr. p. 86.]

How, in the face of this undisputed testimony and admissions by the plaintiff, the court could find that the hazard was not increased is beyond comprehension.

The authorities are unanimous in this and similar cases, that such conditions necessarily constitute both a physical and moral hazard and increase in hazard. See:

Davenport v. Firemen's Ins. Co., 199 N. W. 203 (S. D.);

Westchester Fire Ins. Co. v. Fitzpatrick, 2 Fed. (2d) 651;

Montello v. Manhattan F. & M. Ins. Co., 294 N. Y. S. 1015;

Salley v. Western Mut. Fire Ins. Co., 181 S. E. 74;

Girard F. & M. Ins. Co. v. Scott, 251 N. W. 314.

The Standard Policy Concealment Clause.

The policy provides:

> "This entire policy shall be void, (a) if the insured has concealed or misrepresented any material facts or circumstances concerning this insurance or the subject thereof." [Tr. p. 57.]

This provision is but a statement of the common law and the statutory law of this state. (Insurance Code, State of California, Sections 330, 331, 332, 333 and 334.)

The facts last summarized under the preceding discussion on Increase of Hazard, apply equally to this provision, and under this provision the assured was under a continuing duty to advise the insurers, the defendants,

of these conditions and to secure permission therefor or give the defendants the opportunity to rescind. See:

Miller v. Security Ins. Co., 131 Cal. App. 217;

General Accident Ins. Corp. v. Industrial Acc. Comm., 196 Cal. 179;

St. Paul Fire & Marine Ins. Co. v. Balfour, 168 Fed. 212 (9th Ct.);

Davis-Scofield Co. v. Agricultural Ins. Co., 145 Atl. 38 (Conn.);

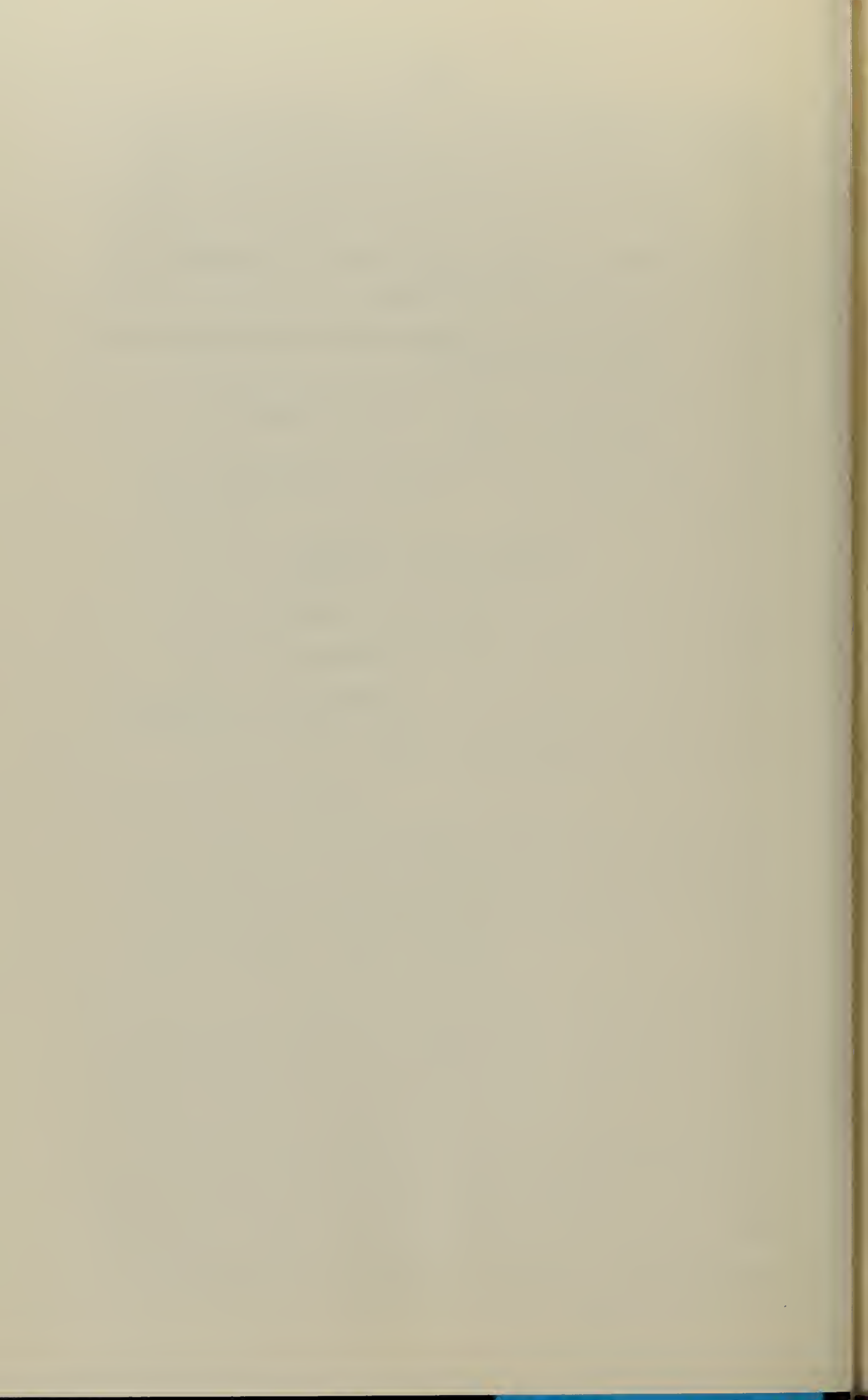
Queen Ins. Co. v. Cummins, 267 S. W. 144.

Respectfully submitted,

E. Eugene Davis,

W. W. Hindman,

Attorneys for Appellant.



No. 9797

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL RESERVE INSURANCE COMPANY OF ILLINOIS, a corporation, and DUBUQUE FIRE AND MARINE INSURANCE COMPANY OF DUBUQUE, IOWA, a corporation,

Appellants,

vs.

ROBERT B. ORD and MINNIE MAY ORD, doing business under the fictitious firm name and style of COMMUNITY ICE CO.,

Appellees.

APPELLEES' REPLY BRIEF.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

FILED

JUL 18 1941

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TOPICAL INDEX.

PAGE

Statement of the case 1

Answer to appellants' statement of errors and argument of the case 9

Answer to the occupancy warranty 10

Answer to the standard vacancy clause: The standard unoccupancy clause 13

Answer to increase of hazard clause 14

Answer to concealment clause 15

Appellee's argument 16

Conclusion 24

Supplement A:

Deposition of Robert B. Ord .... Supp. p. 1

Deposition of Minnie May Ord .... Supp. p. 25

Supplement B:

Statement of Robert B. Ord and Minnie May Ord .... Supp. p. 27

TABLE OF AUTHORITIES CITED.

Cases. PAGE

Aetna Life Ins. Co. v. Sacramento-Stockton S. S. Co., 273 Fed. 55 ....17, 22

Antonelle v. Kennedy, 140 Cal. 309.... 20

Arnold v. American Insurance Co., 148 Cal. 660.... 12

Bassi v. Springfield etc. Fire Ins. Co., 57 Cal. App. 707.... 21

Bayley v. Employers etc. Corp., 125 Cal. 345.... 20

Berliner v. Travelers Ins. Co., 121 Cal. 458....19, 21

Clark v. New Amsterdam Casualty Co., 180 Cal. 76.... 20

Coniglio v. Connecticut Fire Insurance Co., 180 Cal. 596.... 20

Davis Scofield case, 145 Atl. 38.... 15

Enos v. Sun Insurance Co., 67 Cal. 621.... 18

General Accident case, 196 Cal. 179.... 15

Goorberg v. Western Assurance Co., 150 Cal. 510.... 19

Kavanaugh v. Franklin Fire Ins. Co., 185 Cal. 307.... 18

Macintosh v. Agricultural Fire Ins. Co., 150 Cal. 440.... 22

Madison v. North Western Insurance Co., 141 Cal. 475.... 19

Mah See v. North American Ins. Co., 213 Pac. 42.... 21

Miller case, 131 Cal. App. 217.... 15

National Bank v. Union Insurance Co., 88 Cal. 497.... 21

O'Connor v. Grand Lodge A. O. U. W., 146 Cal. 484.... 20

Pacific Heating Co. v. Williamsburgh Ins. Co., 158 Cal. 367....17, 21

Pacific Union Club v. Commercial Union Ins. Co., 12 Cal. App. 503.... 21

Queen Insurance Company case, 267 S. W. 144.... 15

Rankin v. Amazon Insurance Co., 89 Cal. 203.... 19

Raulet v. North Western Insurance Co., 157 Cal. 213.... 18

PAGE

Schroeder v. Imperial Insurance Co., 132 Cal. 18........................ 18

Sharp v. Scottish Union etc. Co., 136 Cal. 542........................ 17

St. Paul case, 168 Fed. 212.. 15

Stevenson v. Sun Insurance Co., 17 Cal. App. 280........................ 18

Swift v. Zurich General, etc. Insurance Co., 297 Pac. 578........12, 23

Taylor v. North Western Nat'l Ins. Co., 34 Cal. App. 471............ 17

Thompson, Estate of, 165 Cal. 290.. 18

Welch v. British American Assurance Co., 148 Cal. 223................ 20

Wells Fargo & Co. v. Pacific Insurance Co., 44 Cal. 397............ 18

Yoch v. Home Mutual Insurance Co., 111 Cal. 503............17, 18, 22

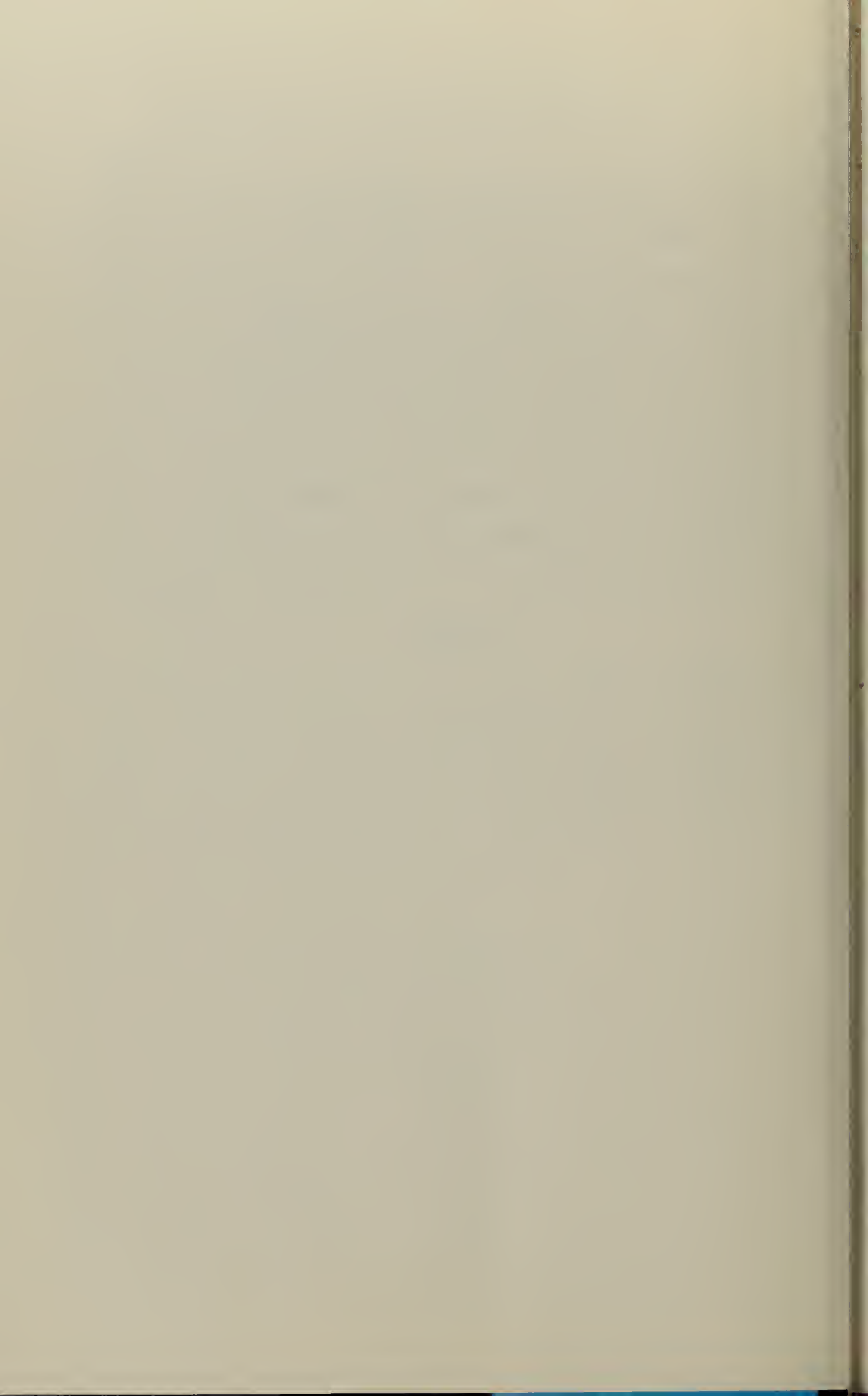
Statutes.

Civil Code, Sec. 1635.. 17

Civil Code, Sec. 1651.. 22

Civil Code, Sec. 1652.. 17

Civil Code, Sec. 1654.. 19



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ROBERT B. ORD and MINNIE MAY ORD, doing business under the fictitious firm name and style of COMMUNITY ICE CO.,

Appellees.

APPELLEE'S REPLY BRIEF.

Statement of the Case.

This is an action upon a fire insurance policy dated June 22, 1937, issued by the defendants, insuring the plaintiffs from loss by fire in the sum of $5,000.00, upon a certain building located at 1245 Jackson street, Hynes, California, and $1,000.00 upon fixtures and equipment. The testimony of the plaintiff Ord [Tr. 37-39], and the stipulation of counsel for the appellant show that defendants were the owners of said property; that the policy was executed and delivered, the premium paid, no notice of cancellation was ever given prior to the fire and that the policy was introduced in evidence as plaintiff's

Exhibit "A" [Tr. 40-72]. The policy contained numerous endorsements as are shown thereon, including the endorsement dated the same date as the policy, being "Form 199" [Tr. 53] providing that:

> "Permission is hereby granted to shut down or cease operations as the occasion may require during the life of the policy."

That the building was completely destroyed by fire on July 15, 1939, and that demand was made upon the defendants, under the terms of the policy, for payment, which was refused. That this action was instituted after refusal by the defendants to pay for the loss of said building under the terms of the policy, but no demand was made for the equipment therein as it had been removed two weeks prior to the fire and that the value of the building at the time of the fire was $6,700.00 [Tr. 20].

The cross-examination of the plaintiff was very short having reference only to the signing of an "Adjusters Agreement", arriving at the loss of the building after all deductions, including depreciation and the ascertainment of ninety per cent of the value at the time of fire, was set at $4,075.00, which was testified to by the plaintiff, that it was "simply an adjustment to avoid litigation" [Tr. 74] and the introduction of the document [Tr. 75-76] and also the introducing of a statement under oath of the plaintiff dated October 11, 1939, taken pursuant to the terms of the policy, and supplemental statement dated November 20, 1939, only a portion of which is set forth in the transcript [Tr. pp. 77-88, incl.].

With the introduction of the above evidence, consuming about fifteen minutes of the Court's time, the case was rested by both parties and the Court, after very brief

argument, rendered its decision which we quote at length at this point as we feel it is a very comprehensive resume of the action, brief and to the point, as follows:

> "The Court: I am about as well prepared to dispose of this now as I might be on further consideration.
>
> Since the closing of the case yesterday I have read the very thorough brief of counsel for the defendant. This policy must, of course, be construed as a whole. The endorsement could not be very much more comprehensive than it is. It is not limited to shut-downs periodically during the packing season, nor is the life of the policy limited by operation. It says: 'Permission is hereby granted to shut down or cease operations, as the occasion may require, during the life of the policy.' So the insured was permitted to cease operation entirely. There is no implied or other obligation to continue operation.
>
> There is no testimony that is persuasive that the closing or shutting down of the packing plant increased any of the hazards; the moral hazard was not increased. The insured was in and about this property, and I think looked after it in a reasonably well-organized fashion. There is nothing to indicate that the condition of the plant at the time of the fire, or preceding it, was endangered in any way by reason of the closing, and this endorsement does not limit the closing so as to restrict liability to increase of moral hazard.
>
> The testimony shows that the value of the property at the time of its destruction by fire was $6,700. The recovery is limited to 90 per cent, I believe, so I think that judgment must be awarded to the plaintiff in the face value of the policy to the amount of

$5,000, that being within the limitation thereof. You may prepare findings.

Mr. Davis: If the court please, may I ask for a finding: The defendant requests the court to find that without permission endorsed thereon, or added thereto, the property described in the policy of insurance became and remained vacant for a period of ten consecutive days prior to the fire. Your Honor has not made any finding on that, and this endorsement does not presume to waive the vacancy.

May I also ask your Honor, in the event you find for the plaintiff, to find that the plaintiff shall not recover in an amount in excess of the amount plaintiff and defendant have agreed upon in a written document signed by the parties.

May I also propose a finding that plaintiff has failed to show that the property at the time of the fire was occupied for packing plant purposes?

I have tried cases before your Honor years ago—I don't know whether your Honor remembers—and I have never argued a case after the court has decided against me.

The Court: Your request for findings you are entitled to. I understood this valuation was on a proposition of immediate settlement.

Mr. Davis: No, it is a written document entered into—

Mr. Myers: That was the testimony.

The Court: So Ord testified.

Mr. Myers: That is right.

Mr. Davis: I objected to it because there had been a written contract signed by the parties.

The Court: I will see what this is. I took it from the testimony that this was on an immediate settlement.

Mr. Davis: It was an agreement to determine the amount without reference to liability.

The Court: The basis is to avoid future misunderstanding or litigation.

Mr. Davis: As to the amount of loss.

The Court: As to the amount of loss or damage.

'It is further understood that the agreement is without any reference to any other question or matter of difference within the terms and conditions of the policy or policies of insurance covering thereon other than that of determining the amount of loss or damage as above stated.'

The court finds that all of the machinery installed within this plant was removed from the building about two weeks preceding the fire.

Mr. Davis: And at the time of the fire the building was vacant.

The Court: That at the time the building was destroyed by fire no machinery was within the building.

Mr. Davis: And that no machinery had been in the building within two weeks prior to the fire.

The Court: Yes; I so found.

Mr. Davis: Your Honor, the issue on that, or finding, is that there was no waiver endorsed upon the policy or added thereto permitting this vacancy.

The Court: The policy speaks for itself. That is a conclusion.

Mr. Davis: I want to call Your Honor's attention to the question that Your Honor mentioned as to the increase of hazard, moral or otherwise. That is not in the case at all.

The Court: No, but I just mentioned that in commenting upon the limitations of the policy.

Mr. Davis: I ask Your Honor to find that plaintiff has failed to show he furnished preliminary proof of loss, as provided in the policy.

The Court: I could not find that, because that is not before me. The only matter before me relative to notice of loss would be that the adjuster appeared and the matter was adjusted, and the presumption would be that notice was given.

Mr. Davis: I will ask Your Honor also to find that at the time of the fire the property was not occupied for packing house purposes. We have got to have a finding one way or the other.

The Court: That is a conclusion. I have found what the conditions were.

Mr. Davis: The plaintiff will have to make his findings and judgment stand up by a finding, under these authorities, that the property was occupied for packing plant purposes at the time of the fire.

The Court: That is a conclusion which I have covered by the facts found; that the machinery was removed and that no packing had been done in the building—I will find that; that no packing had been done in the building for some time previous to the fire, and that all of the machinery had been removed two weeks before.

Mr. Davis: You say the plaintiff is to present findings to Your Honor?

The Court: I think so. You can prepare your findings and conclusions and judgment and serve them upon counsel for the other side.

Mr. Davis: May we have an opportunity to argue the findings when they are presented?

The Court: You can prepare your proposed findings, if you like. I will take them up. When can you present those?

Mr. Myers: May we have until the first of the week?

The Court: No, I am going to leave before the first of the week. I will make it Friday morning at 10 o'clock."

The appellee's feel, and have always maintained throughout this entire action, that the issues involved herein are very simple and rest entirely upon a construction of the policy of insurance giving effect to the endorsements placed thereon and to construe the policy as a whole and that behind the smoke screen set up by the appellant, and the various defenses raised, the sole question involved is whether or not the endorsement dated June 22, 1937, the same date as the policy itself, providing, *"permission is hereby granted to shut down or cease operations as the occasion may require during the life of the policy"* is a general endorsement or whether it is to be given a limited construction.

The only testimony respecting the operations conducted within the packing shed are derived from the deposition of the plaintiff, R. B. Ord, taken October 11, 1939, and November 20, 1939, by the defendants long before the suit was filed, and authorized by the terms of the policy [Tr. 62] for the purpose of investigation by the company and although the appellant has seen fit to incorporate only certain portions of this deposition in its transcript, the appellees feel that the Court should have the benefit of the entire deposition which we attach as a supplement to

this answering brief, marked "A" and "B", and ask the indulgence of this Court to consider the deposition as a whole in order to obtain as complete a picture of these operations as possible. It will appear from the depositions that the operations conducted in the premises were not manufacturing but packing, and using ice in the packing, and loading of the packed boxes into railway cars; in simple language, a vegetable packing shed, and not a manufacturing plant in any sense of the word, and the equipment used therein was not large, bulky equipment but such as can easily be moved about and not essential to the use of the building but more as items for increased efficiency. It is true that the packing shed was not operated for some time, but at all times the place was patrolled by the plaintiff twice a day [Tr. 84]. There is no support in the evidence for appellants statement that the packing shed was in a delapidated condition, as the value of the building alone, after all deductions taken by the insurance company, including depreciation and the ninety per cent valuation clause, was set by them at $4,-075.69 as shown in the adjuster's agreement [Tr. 75-76] and the testimony of the value of the building before depreciation, etc., was $6,700.00 [Tr. 20]. This certainly is not consistent with the appellants' statements in which he attempts to minimize the value. (App. Br. p. 4.) We feel that the appellants' statements contained on pages 4 and 5 of his opening brief are not true statements of the facts and refer this Court to the deposition of R. B. Ord, attached hereto as a supplement, "A" and "B", as a true statement of fact.

Answer to Appellants' Statement of Errors and Argument of the Case.

Appellees feel that the statements of error claimed by the appellant and his argument of the case may be grouped as one unit and all may be very simply stated in the following: The Court erred in interpreting the rider allowing the insured permission to shut down and cease operations as the occasion may require during the life of the policy; as general waiver instead of a limited one. In answer to this we respectfully call attention to the words of the trial court at the time his opinion was rendered.

> *"The policy must of course, be construed as a whole. The endorsement could not be very much more comprehensive than it is. It is not limited to shut downs periodically during the packing season, nor is the life of the policy limited by operation. It says 'Permission is hereby granted to shut down or cease operations as the occasion may require during the life of the policy'. So the insured was permitted to cease operations entirely. There is no implied or other obligation to continue operations."*

This shows very clearly that the trial court gave effect to the endorsement in a very general way which we feel was proper, and the only interpretation which could be found by the Court. The appellees feel that the above statements answer fully the contentions claimed in specifications of errors, III.

Answering specifications of errors IV we respectfully submit that the finding of fact No. X [Tr. p. 27, fol. 33], is the statement by the trial court in its own words [Tr. 19], and is amply supported by the evidence disclosed in the deposition of R. B. Ord attached hereto as Supple-

ment "A" and "B". It will also be noted that when the Court made the finding herein questioned, that counsel for the appellant made the following statement to the Court:

> "Mr. Davis: I want to call Your Honor's attention to the question that Your Honor mentioned as to the increase of hazard, moral or otherwise. *That is not in the case at all.*
>
> The Court: No, but I just mentioned that in commenting upon the limitations of the policy."

Apparently appellant, although not relying upon this defense at the trial, is now attempting to raise it for the first time upon appeal. However, in spite of the appellant not so relying upon it at the time of trial, the Court nevertheless, made a finding upon the very issue.

All of the other claims of specifications of error, numbers I to XII, inclusive, we feel will be answered in the appellees' response to appellants' argument of the case as follows:

Answer to the Occupancy Warranty.

Appellants' brief cites numerous authorities and portions of testimony contained in an affidavit and deposition of the plaintiff's taken pursuant to the terms of the insurance policy, and before answering the brief in detail, appellees desire to bring to the Court's attention, the fact that the insurance policy, with all of the riders attached thereto, is to be considered as the contract. This certainly needs no authority in support thereof as it is well established law of which the Court would take judicial notice that the entire contract must be read as a whole and construed as one contract and effect given

thereto as a complete document so that all of its provisions and terms can be given force and effect.

Appellants lay great stress upon the fact that the building was not occupied as a packing plant during the term of the policy and by reason thereof there was a concealment of a material fact sufficient to void the policy. In answer to this matter, in addition to the general statement above mentioned, we refer to the endorsement on the policy being Standard Form No. 78, reading as follows:

> "On the following described property, all only while situate 1245 Jackson Street, Hynes, California, $5,000.00 on the one story Composition roof Frame building and its additions (if any) of like construction communicating and in contact therewith, while occupied only for Packing Plant purposes, including * * *."

It appears to these appellees that this is not a statement of a material fact sufficient to void the policy as this statement does not contain, as the appellants would imply, that at the time of issuance of the policy the premises were vacant or unoccupied and the cases cited by the defendant with respect to concealment of material facts sufficient to defeat the terms of the policy are not in point, and in order that the cases cited by appellant could be applicable to the present matter at issue, the packing shed would have had to have been destroyed prior to the issuance of the policy or the appellees would have had to have received information upon which to base such an assumption and obviously this was not the fact in the present matter.

The appellees' submit in answer to this contention, that force and effect must be given to the entire policy, including the endorsements entitled "Form 199" attached thereto, at the time of issuance of the policy reading as follows "Permission is hereby granted to shut down or cease operations as the occasion may require during the life of this policy", and obviously whether or not the premises were occupied or vacant at the time of the issuance of the policy can have no effect.

Appellants call this Court's attention to the fact that the evidence disclosed that the premises were unoccupied at the time of the fire. Under the terms of the policy it was not necessary that they be occupied as the rider to the policy did not require occupancy.

In none of the cases mentioned by appellant was the occupancy clause waived by rider, as in the present action. The courts have uniformly held that *a rider must be read with every inconsistent clause of the policy.* (*Swift v. Zurich General, etc. Insurance Co.*, 297 Pac. 578.)

The evidence introduced at the trial showed that said premises were not operating as a packing shed but that the plaintiff was in and about the premises at least twice a day almost every day, which appellees feel is and was a sufficient jurisdictional compliance with the provisions set forth in the *Arnold v. American Insurance Co.*, 148 Cal. 660.

We respectfully submit that we have no quarrel with the law set forth in the twenty-three cases set forth on page 14 of appellant's opening brief, *but the application of the law contained therein does not apply to the instant case* and is therefore not applicable to the problem at hand.

Answer to the Standard Vacancy Clause: The Standard Unoccupancy Clause.

The above clauses are separated in appellants' brief as separate matters but are the same clause in the policy and I presume are separated here because they are worded in the disjunctive. In answering the above clauses we shall consider them as one. The appellants have devoted six pages of their brief to the vacancy and non-occupancy clause in the policy, citing various and numerous cases, all to the effect that if the premises are vacant or unoccupied beyond the period of ten consecutive days the policy is void, and in all of the cases cited there were no exceptions by endorsement upon the policy, or any waiver of such a clause contained in all fire insurance policies, and in all of the cases cited there was a vacancy and the premises were unoccupied for a period in excess of ten days and that after the expiration of said ten days period and before occupancy was again established, a loss occurred.

With this general statement of law, the appellees have no quarrel but, obviously the cases and law applicable thereto have no bearing on the case at issue; as the present case and the policy in force at the time, granted the plaintiff permission to *shut down or cease operations* for an unlimited period of time which obviously modifies the ten day vacancy and unoccupancy clause and we respectfully represent that the cited cases have no bearing upon the case at issue, are not in point and should not be considered in the present action.

It will be noted that the appellant herein attempts to place a limited construction upon the rider which we have mentioned many times herein, endeavoring to apply it only to a certain clause applicable to a manufacturing plant,

which the appellant states is such a plant as is here under consideration. We earnestly call the Court's attention to the fact that there is no evidence that the packing shed herein is a manufacturing plant and the use of such a term is a fiction of the appellants' imagination. The evidence from the plaintiffs' deposition clearly shows it was a packing shed, using ice in the packing, loading the packed boxes in refrigerator cars and we submit that the packing shed was what would be commonly termed a vegetable or produce shed [Supplement "A" and "B"], as these vegetables are the only things packed in boxes with ice in them and loaded in refrigerator cars, all of which is common knowledge to everyone, including the appellant, and we feel his attempt to cloud the issues herein presented, stating the packing shed to be a manufacturing plant, is wholly unwarranted.

Answer to Increase of Hazard Clause.

Answering the appellant's contention that there was an increase of hazard, we hereby request that the deposition of Robert B. Ord, and his affidavit [Supplement "A" and "B"] be read in full and not isolated portions thereof, in connection with the increase of hazard and in this connection we submit that a packing plant such as under consideration, located on a railroad right-of-way, and all of the contingencies existing therein and thereabout were a matter of common knowledge to the appellants at all times and none of the cases cited by the appellants, either by fact or law, are applicable to the present matter in that there was no increase of a moral hazard as stated in the *Davenport v. Fireman's Insurance Co.* case, as the value of the building was considerably in excess of the insurance carried thereon and the building was not con-

demned as stated in the *Westchester Fire Insurance Co. v. Fitzpatrick* cases and there is no evidence in the present matter that the building was found to be unsafe and in a hazardous condition as in the *Montello* case and there is no question that the building was being used for a more hazardous purpose than a packing shed as is stated in the *Salley* and the *Girard Fire and Marine Insurance Company* cases.

Answer to Concealment Clause.

We submit that from all the evidence before the Court, including the policy of insurance and all its riders attached, does not show any concealment of a material fact sufficient to void the policy. The answer to increase of hazard applies as an answer to this contention and we submit that none of the cases cited have application to the instant case; as in the *General Accident* case cited (196 Cal. 179) the building was destroyed before the insurance was placed thereon; in the *Miller* case (131 Cal. App. 217), the property was covered to be used as a hospital and sanitarium but was never used as such, it being used for a different purpose; the *St. Paul* case (168 Fed. 212), the *Davis Scofield case* (145 Atl. 38), and the *Queen Insurance Company* case (267 S. W. 144) all define material facts.

The general rule is that all facts must be disclosed in order to give the insurance company a full picture of the risk assumed and we submit that in this matter all the facts were disclosed and all waived by the company by the attachment of the rider we have so often mentioned.

Appellees' Argument.

The appellees will endeavor in its argument which follows, to limit it to the single question involved in the appeal, to-wit: WHETHER THE RIDER *dated June 22, 1939, reading as follows:*

> *"Permission is hereby granted to shut down or cease operations as the occasion may require during the life of the policy"*

shall be considered a waiver of all portions of the policy inconsistent with it, namely, the occupancy warranty, the vacancy clause, the unoccupancy clause, the increase of hazard clause and the concealment clause or whether as claimed by the appellant it applies to only one clause, namely,

> "If the subject of insurance be a manufacturing establishment, while it is operating in whole or in part at night, later than ten o'clock, or while it ceases to be operated beyond the period of ten consecutive days".

Let us first consider the facts as presented to the Court respecting the type of business conducted on the premises. We respectfully call the Court's attention to statement of R. B. Ord, attached as a supplement hereto, dated November 29, 1939, in which it is clearly stated that the building was erected along a railway spur as a vegetable packing shed. It seems clear to us that obviously, such a vegetable packing shed could not be considered a manufacturing establishment as it is common knowledge that the operations of a vegetable packing shed consist of packing vegetables and produce, using ice in the packing thereof and loading them into refrigerator cars for shipment, and that it is *not considered manufacturing.*

We feel that in view of the operations conducted on the premises that any provisions contained in the policy referring to manufacturing plants has no application to the operations of a vegetable packing shed such as is involved in this action.

Policies of insurance are written contracts, governed and interpreted by the rules which ordinarily apply to other contracts. An insurance contract, like any other, should be considered as a whole, and the different parts should be read together, all of which must, if possible, be harmonized and given effect. The terms of the policy constitute the measure of the insurer's liability, and it should be construed according to the language used therein, in order to arrive at the true meaning. Construing the policy as a whole, consideration should be given to the nature of the property insured, the purposes for which it is ordinarily used, its situation, and the manner in which it is usually kept. Repugnancies in the contract must be reconciled by such an interpretation as will give some effect to the repugnant clauses subordinate to the general intent and purpose of the whole.

> *Civil Code*, Section 1635;
>
> *Yoch v. Home Mutual Insurance Co.*, 111 Cal. 503;
>
> *Sharp v. Scottish Union etc. Co.*, 136 Cal. 542;
>
> *Aetna Insurance Co. v. Sacramento-Stockton S. S. Company*, 273 Fed. 55;
>
> *Pacific Heating Co. v. Williamsburgh Ins. Co.*, 158 Cal. 367;
>
> *Taylor v. North Western Nat'l Ins. Co.*, 34 Cal. App. 471;
>
> *Civil Code, Section* 1652.

The construction of the contract, whether arrived at from a mere reading of the instrument or from such a reading aided by extrinsic evidence, is generally a question of law. Whether the property insured was a building within the meaning of that word as used in the policy is a question of fact to be determined by the jury from all the surrounding circumstances.

Estate of Thompson, 165 Cal. 290;

Enos v. Sun Insurance Co., 67 Cal. 621.

The parties to a fire insurance policy are deemed to have entered into the contract with reference to the statutory form; in other words, the statutory form is the commodity which is bought and sold in such transaction. It has also been said that contracts of fire insurance will be construed in view of their general objects and the legitimate conditions prescribed by the insurers, rather than upon a basis of strict technical interpretation.

Kavanaugh v. Franklin Fire Ins. Co., 185 Cal. 307;

Raulet v. North Western Insurance Co., 157 Cal. 213.

It is a cardinal rule that contracts of insurance are interpreted and enforced like other contracts so as to give effect of the intention of the parties which is to be deduced, if possible, from the language of the contract reasonably construed.

Yoch v. Home Mutual Insurance Co., 111 Cal. 397;

Wells Fargo & Co. v. Pacific Insurance Co., 44 Cal. 397;

Stevenson v. Sun Insurance Co., 17 Cal. App. 280;

Schroeder v. Imperial Insurance Co., 132 Cal. 18.

It is settled that where the language of an insurance contract is ambiguous, it is to be construed most strongly against the insurer, who is presumed to have drawn the policy and caused the uncertainty to exist. Doubtful or conflicting clauses should be construed against the party responsible for the ambiguity. Since the policy is the language of the insurer, it is said to be both reasonable and just that its own words should be construed most strongly against it. Accordingly, it has been held that where the language of an application and policy, or of a policy, may be understood in more than one sense, it is to be construed against the insurer, and no term not expressed in the policy may be imported therein by implication to relieve the insurer from liability. The insurer is bound to use such language as to make the conditions, exceptions and provisions of the policy clear to the ordinary mind, and in case it fails to do so, any uncertainty, ambiguity or reasonable doubt should be resolved against it.

> *Rankin v. Amazon Insurance Co.*, 89 Cal. 203;
>
> *Civil Code*, Section 1654;
>
> *Madison v. North Western Insurance Co.*, 141 Cal. 475;
>
> *Berliner v. Travelers Ins. Co.*, 121 Cal. 458;
>
> *Goorberg v. Western Assurance Co.*, 150 Cal. 510.

The courts have also announced a rule which is the counterpart of that above discussed, to the effect that when the language employed in an insurance contract is ambiguous, or when a doubt arises in respect to the application, exceptions to, or limitations of, liability thereunder, they should be interpreted most favorably to the insured, or to the beneficiary or mortgagee to whom the loss is

payable as his interest may appear. Such contracts are to be interpreted in the light of the fact that they are drawn by the insurer, and are rarely understood by the insured, to whom every rational indulgence should be given, and in whose favor the policy should be liberally construed. Where the language and terms of a policy are framed and formulated by the insurer, every ambiguity and uncertainty therein should be resolved in favor of the insured.

> *Bayley v. Employers etc. Corp.*, 125 Cal. 345;
>
> *Clark v. New Amsterdam Casualty Co.*, 180 Cal. 76;
>
> *Welch v. British American Assurance Co.*, 148 Cal. 223;
>
> *Coniglio v. Connecticut Fire Insurance Co.*, 180 Cal. 596.

Because of their stringent character, warranties are not favored in law, and no construction is indulged which imposes a strict warranty of the literal truthfulness of statements, where the terms of the contract are conflicting or inconsistent or render intention to make such warranty doubtful.

> *O'Connor v. Grand Lodge A. O. U. W.*, 146 Cal. 484.

Moreover, courts are disinclined to construe stipulations as conditions precedent, unless compelled by the language of the contract plainly expressed.

> *Antonelle v. Kennedy*, 140 Cal. 309.

And when a policy contains contradictory provisions, or is so framed as to render it doubtful whether the parties intended a statement as a warranty, it should be construed so as not to impose such obligation.

National Bank v. Union Insurance Co., 88 Cal. 497.

The modification of a contract of insurance is governed by the rules which are applicable to contracts generally. A standard fire insurance policy can not be modified, changed or added to, except by attachment of separate riders, either before delivery or afterwards, with the consent of the insured.

Bassi v. Springfield etc. Fire Ins. Co., 57 Cal. App. 707.

While an insurance policy, like other contracts, is construed according to its terms, and courts do not undertake to relieve a party from express and plain stipulations into which he has entered, still the rule is established that exceptions and provisos in a policy are strictly construed against the insurer and liberally in favor of the insured. It has been said that this is now the settled rule for construing all kinds of policies, rendered necessary, especially in modern times, to circumvent the ingenuity of insurers in so framing contracts of this kind as to make exceptions unfairly "devour the whole policy." The rule is applicable when words in the policy leave its meaning as to exceptions in doubt.

Pacific Heating Co. v. Williamsburgh Ins. Co., 158 Cal. 367;
Berliner v. Travelers' Ins. Co., 121 Cal. 458;
Mah See v. North American Ins. Co., 213 Pac. 42;
Pacific Union Club v. Commercial Union Ins. Co., 12 Cal. App. 503.

The law looks with disfavor upon forfeiture. Consequently, uncertain language in a policy is interpreted, if possible, so as to avoid a forfeiture. Thus it is established that conditions which would provide for a forfeiture of the interest of the insured, or other persons claiming under the policy, are strictly construed against the insurer, so as to prevent forfeiture if the provisions may reasonably admit of such an interpretation.

> *Mackintosh v. Agricultural Fire Ins. Co.,* 150 Cal. 440, 453.

Where a contract is partly written and partly printed, the written control the printed parts, as being the more deliberate expression of the contracting parties. In case of repugnancy between the two, the printed parts are disregarded. This rule has been held to apply where a reinsurance clause is placed on the general printed form of policy by a rubber stamp. Where the contract is partly written and partly printed, and printed matter is copied from a form originally prepared without special reference to the particular parties and the particular contract in question, the written parts are controlling, and the parts purely original control those copied from a form; and if the two are repugnant, the latter must be so far disregarded. The doctrine that written control printed parts has been held to be subject to the rule that words of exception in a policy, if doubtful, are to be construed against the party for whose benefit they are intended. *Where a printed provision of a policy is inconsistent with a rider, the latter controls.*

> *Civil Code.* Section 1651;
>
> *Yoch v. Home Mutual Ins. Co.,* 111 Cal. 503;
>
> *Aetna Life Ins. Co. v. Sacramento-Stockton S. S. Co.,* 273 Fed. 55.

I feel that the language in the case of *Swift v. Zurich General Accident Company* 112 Cal. App. 709, 297 Pac. 578, is particularly applicable to the present action and we take the liberty of quoting therefrom at length as follows:

> "The only rules of law involved in the appeal are that the rider must be read with every clause of the policy as if it were set forth in the body of the policy (Burr v. Western States Life Ins. Co. Cal. Sup. 296 P. 273) that, when it is expressly stated in the rider that it is substituted for inconsistent provisions of the body of the policy, the rider will control (32 Cor. Jur., pp. 1159-1160), and that, when there is any ambiguity in the policy caused by the insurer, the policy will be given an interpretation most favorable to the assured (Maryland C. Co. v. Industrial Acc. Com., 178 Cal. 491, 494, 173 P. 993; 14 Cal. Jur., P. 443, para. 24).
>
> "Here the policy seems to have been written with the design to make it ambiguous, because, if the omnibus coverage indorsement contained in the rider was not intended to be 'omnibus' in the matter of coverage, but was intended to be controlled by inconsistent exceptions in the body of the policy, it would have been a simple matter to have so declared that intention in the rider. If, therefore, we have misjudged the intention of the parties in the interpretations we have placed upon the contract, the respondent is nevertheless entitled to that interpretation under the rule stated in the section in California Jurisprudence cited above."

Conclusion.

In conclusion it is the contention of the appellees that the sole question for determination by this Court is the interpretation of the contract of insurance with particular reference to the rider attached, granting the appellees permission to shut down or cease operations as the occasion may require during the life of the policy and that this rider must be read and given the effect of waiving all printed provisions of the policy inconsistent therewith and it is the contention of the appellees *that said rider constituted a waiver of the vacancy or unoccupancy clause, the increase of hazard clause, the occupancy warranty and the concealment clause* and that all of the provisions thereof were expressly waived by the appellants by their rider and endorsement on said policy and, having been so waived and the contract having been interpreted by the lower court as a single document, giving effect to all of the provisions thereof, *was a complete contract, in full force and effect at the date of the fire* and that the appellees are entitled to recover the amount of loss suffered therefrom and that the appellants have presented no defense to the action and that the decision of the lower court should be sustained.

Respectfully submitted,

Gerald Willis Myers,
Attorney for Appellees.

SUPPLEMENT "A".

[Rep. Tr. pp. 1 to 31]:

Deposition.

In the Superior Court of the State of California, in and for the County of Los Angeles.

Examination under oath of Robert B. Ord and Minnie May Ord, taken at Los Angeles, California, October 11, 1939.

Examinations under oath of Robert B. Ord and Minnie May Ord, taken at 808 Consolidated Building, Los Angeles, California, at 11:30 o'clock a. m., October 11, 1939, re: Policy No. 182233 of the Reserve Underwriters of the Dubuque Fire Marine Insurance Company and National Reserve Insurance Company in reference loss by fire, July 15, 1939.

Present: E. Eugene Davis, Esq., J. F. Price, Esq., Gerald Willis Myers, Esq., Robert B. Ord, Minnie May Ord, Fred H. Quail, Notary Public.

ROBERT B. ORD,

having been first duly sworn, deposed and testified as follows:

Examination

By Mr. Davis:

Q. Your name is Robert B. Ord?

A. Yes.

Q. Do you understand what this examination is?

A. No, I don't.

Q. Let me explain that—

Mr. Myers: May I ask this: I presume that this is an examination under the terms of the policy wherein the insured is required to submit to examination as often as

required if requested by the company, and subscribe to any testimony given with respect to the policy or to the fire.

Mr. Davis: That is correct. Do you understand that?

The Witness: I don't understand why I am here, but I understand I am here.

Mr. Davis: Q. We are merely questioning you about the matters we are inquiring into, but it is taken under the terms of the policy, as Mr. Myers just explained to you, whereby the insured is required to appear to testify under oath to material matters when so requested by the company. I am here representing the Reserve Underwriters to question you as is Mr. Price.

A. Mr. Myers has told me that according to the policy I should appear, as I am appearing.

Q. And you are here.

A. That is it.

Q. This is to get a record of the entire situation, your ownership and the cause of the fire. As we go along that will appear. First, Mr. Ord, you and Minnie May Ord are husband and wife?

A Yes.

Q. This policy was originally written to H. G. Flint. Tell me what that relationship was.

A. It was a partnership. It was a—excuse me if I am slow. I want to think. It takes me some time.

Q. I want you to get it accurately.

A. This was a four-way partnership. It was H. G. Flint, C. S. Thompson, Minnie May Ord and R. B. Ord. At the time the policy was taken out H. G. Flint was a partner. At a later date after the issuance of the policy Minnie May Ord and R. B. Ord purchased the interests of H. G. Flint, and that answers the question.

Q. Yes. I will amplify it. I noticed you were doing business under the name of Community Ice Company. Did you file certificate of fictitious name?

A. The original partnership did, yes.

Q. That was the one that Thompson was in?

A. Yes. At the time of the purchase of this other partnership there was no transaction recorded about a fictitious name.

Q. When did your original partnership first acquire this property?

A. Some time in either late 1926—you mean that is connected with this policy?

Q. The property described in this policy.

A. It was on leased property. The original building was built in 1929. Additions were made until 1932, I believe.

Q. Your partnership built the building?

A. Yes, that is right.

Q. Do I understand that correctly?

A. That is right.

Q. In 1926?

A. No.

Q. In 1929?

A. Yes. The partnership was incorporated and was in business two years.

Q. You don't mean incorporated. It was formed.

A. It was formed and was in operation two years at least prior to the erecting of this building.

Q. Is that ground a railroad right of way?

A. It is railroad property.

Q. It is railroad property?

A. Yes.

Q. Do you have the lease here?

A. No.

Q. You don't remember the terms of the lease, do you?

A. No.

Q. I mean the period for which it was to run.

A. I believe it was for five years. There have been renewals. Occasionally there have been additions.

Q. Where is the lease now?

A. I believe I have it in the office of the Community Ice Company.

Q. If it becomes necessary for us to examine it—

A. I believe I could procure it or I could get a duplicate.

Q. Where is the office of the Community Ice Company?

A. At 1225 Jackson street, Hynes.

Q. Where is that with reference to the property we are discussing?

A. It is approximately 300 feet in a southeasterly direction.

Q. On separate property?

A. Yes. The Community Ice Company is on property owned in fee simple by the Community Ice Company.

Q. I understand there is an ice plant out there.

A. That is true.

Q. Close to the property that burned?

A. Yes. The office of the Community Ice Company and the ice plant are in the same building.

Q. About 300 feet south?

A. Approximately.

Q. Approximately?

A. Yes; southeast.

Q. That property is owned in fee by you?

A. Yes; by the Community Ice Company.

Q. By the way, what railroad is this lease with?

A. The Union Pacific.

Q. As far as you remember now at the time of this fire your lease had been extended so that it was in force?

A. Yes. I don't know of any reason why it shouldn't have been.

Q. What I mean, you did have a lease in writing at the time of the fire that had not expired? Your extensions had not expired?

A. I believe so.

Q. I notice there is a mortgage to the First National Bank of Bellflower. Will you tell us about that, please?

A. You mean why it was there?

Q. Yes.

A. And in detail?

Q. Yes.

A. Well, as I told—

Q. First of all, what did it cover?

A. You mean what was the collateral?

Q. Yes, what was all the collateral.

A. It was the property of the Community Ice Company, 1225 Jackson, and also all of our interests in this packing shed located at 1245 Jackson street.

Q. Was that a real estate mortgage, or do you remember?

A. I believe so.

Q. That mortgage undoubtedly would be recorded?

A. I presume so.

Q. Do you know when that mortgage was given?

A. The mortgage was re-made twice. Originally it was for $5750.00 for the purchase of C. S. Thompson's interests in the packing shed.

Q. About when was that?

A. I don't know. I say—I don't know.

Q. Give us an approximation.

A. I was trying to get an approximate idea.

Q. All those things we can verify by the records.

A. I wouldn't want you to put anything into the record that might not be true.

Q. Yes.

A. May I ask Mrs. Ord?

Q. Yes.

The Witness: Do you remember when we put the mortgage on?

Mrs. Ord: No, I don't.

Mr. Davis: You are not binding yourself in giving us your approximation. It is just so I can get an idea of the case.

A. I may be two or three years off.

Q. That is all right.

A. I would say either 1934 or 1935.

Q. That was the first?

A. Yes; that was $5750.00. Then I made two or three $1000.00—I made three $1000.00 payments. I must have made four payments to bring the balance down to $2000.00. I then purchased H. G. Flint's interests, and to make the purchase, with what money I had of my own, I had to raise that mortgage and ante it up $2000.00 more. In other words, I then had a mortgage of $4000.00 on the property.

Q. That was approximately when?

A. Can I ask Gerald?

Mr. Davis: Yes.

Mr. Myers: It was about two years ago.

The Witness: You remember you handled the transaction.

Mr. Myers: About two years ago.

Mr. Davis: We can verify those.

Mr. Myers: I have those records in my office. It was a dealing with John Frederick's office. His records and my records would show that.

Mr. Davis: That was a new mortgage?

Mr. Myers: No, I had nothing—

The Witness: There was no trace of title. I think it was a new mortgage but there was no retracing of title or anything. I didn't have to pay any fees of any kind.

Mr. Davis: Q. Did you actually execute the mortgage at the time, or did you let the old mortgage stand?

A. I don't know.

Q. I don't think a bank would do that.

Mr. Myers: I don't know whether the bank merely increased the mortgage they had or executed a new mortgage.

Mr. Davis: At any rate, we can get that accurately if it becomes very material. All I am trying to do is get a general picture now.

The Witness: We can get that dope very easily if it is needed.

Mr. Davis: Q. At the time of the fire what was the amount of the debt which the mortgage secured?

A. $3000.00 plus interest for—oh, I would say, from approximately the first of January of this year, 1939.

Q. That mortgage covered not only the property that was involved in the fire, but also the other property, the ice plant, your fee property?

A. Yes.

Q. Was any property not covered by the mortgage?

A. I don't think so. I don't know. You know, I am not familiar. You don't remember every detail. A bank mortgage generally covers everything you may own, but I can't recall anything except—

Q. It covers everything they can get?

A. Yes.

Q. Approximately two years ago you bought out Flint. When was the last time you used or operated the plant?

A. The last time I used this, you mean, as an ice plant?

Q. I shouldn't say plant. I mean the building that is described in this policy.

A. I think it was about the middle of 1936.

Q. That was before you bought Mr. Flint out then?

A. I can't remember. I just can't remember that. I would say it was before, yes.

Q. Suppose I let you tell us this way: tell us the way you operated these properties. Go back to it briefly, to the time you—

A. Closed the property?

Q. No, you operated it. Bring it up so I will get a picture of what it is all about.

A. You mean at the time we built it, and why?

Q. Yes, and so on.

A. Well, the first building was built in 1929 for the Harold Osborne Packing Company. That operated for three or four years.

Q. You mean your firm, the Community Ice Company. built it and leased it to—

A. We leased it to Osborne on a basis that he would pay us so much a ton until we had gotten back the amount of money that we had invested in it. The first year he paid us back. The second year he didn't do so well, and we advanced him some money and put a mortgage on it.

Mr. Myers: May I interrupt here just a moment. I think this will clear it up. When you say he was to pay you so much a ton, he was in the packing business and you furnished him ice from the ice company?

The Witness: Yes.

Mr. Myers: In addition to the price of the ice he was to pay you a surplus above that which was to apply upon the purchase price of the building, the cost of the building?

The Witness: Yes.

Mr. Myers: So you get the entire picture.

Mr. Davis: The statement of Mr. Myers' is correct, isn't it?

The Witness: That is it, yes.

Mr. Davis: Q. Did he pay out?

A. He paid out the first year.

Q. By the way, what was the purchase price to him of the building?

A. That first addition was approximately $4500.00.

Q. Did you execute any deeds or bills of sale to him?

A. I believe we gave him a bill of sale.

Q. Of the building?

A. Of the building. Then the second year additions were made and a mortgage was made. We had approximately $10,000.00 tied up in the building and incidentals and one thing and another. Mr. Osborne owed us money

for ice, and his business wasn't doing well, and he gave us a bill of sale to this property.

Q. He gave it back to you?

A. He gave it back to us in return for a clear release from all obligations to the Community Ice Company.

Q. When was it that he gave you the bill of sale back?

A. May I ask my counsel?

Q. Yes.

The Witness: Jerry, you possibly remember it.

Mr. Myers: I don't remember the date. I know when it was done.

The Witness: You remember when it was done, don't you?

Mr. Myers: I don't remember the date.

The Witness: From memory again, I would say in 1932. I would hate to be called some time to say I definitely said 1932. I believe it was 1932.

Mr. Davis: Q. You say it was returned to you in approximately 1932?

A. Then we had this packing shed vacant. We wanted to get rid of our ice so we got hold of J. W. Rarity and sold him the packing shed for $8000.00 on an ice contract deal the same way, with so much for the ice and a surplus of 50 cents a ton for each ton of ice.

Q. Which was to be applied to the purchase price?

A. Yes. In the event he bought 16,000 tons of ice he was to pay 50 cents a ton. After he had bought 16,000 tons of ice for $10.00 a ton he could buy the packing shed.

Q. You mean you would give him the title and convey the packing shed to him?

A. After that much ice had been bought. He continued to operate until the middle of 1936, and then he failed.

Q. Was that machinery installed for the purpose of operating the packing shed as an operating shed?

A. It was made in three or four separate installments, yes.

Q. Who put the machinery in?

A. The Community Ice financed it and this Mr. Osborne was to pay it back at the rate of so much a ton for ice.

Q. The Community Ice either installed it or caused it to be installed?

A. That is right.

Q. All right. After Osborne blew up then what happened?

A. Then we leased this property in 1933 to the Ice Exchange, Inc.

Mr. Myers: What do you mean by this property?

The Wtiness: All of our property; the ice plant.

Mr. Myers: And the packing shed?

The Witness: And the packing shed. It was stipulated that we could not re-sell this property to anyone or release it to anyone except J. W. Rarity unless the new purchaser or leaser would buy all of his ice from the Ice Exchange at the market rate for ice. We were unable to find either a purchaser or a renter that would take it at that price for ice, and let us get out with any profit at all, because there was nothing in it for them.

Q. For the time being you were out of the ice business then after you made this deal with the ice association?

A. Yes. I was working for them as their representative at that location. That is what it amounted to.

Q. But the ice association didn't take over the plant?

A. Yes, they took it over and closed it up.

Q. I meant the packing shed.

A. They leased it. It was leased to them.

Q. It was leased to them?

A. It was leased to them subject simply to this sales contract that we had with J. W. Rarity. In the event J. W. Rarity defaulted on that contract—

Q. Then they would get it?

A. —then they—I can't recall the details fully on that. Then the Community Ice Company had the right to either re-sell it to somebody else or re-lease it to somebody else, but the new buyer or leaser would have to buy his ice from the Ice Exchange at the current price. That was the way it was.

Q. That arrangement started, you say, in 1933?

A. Yes. The 29th of May.

Q. How long did that continue?

A. That lease was for ten years. That agreement was for ten years.

Q. With the ice association?

A. Yes.

Q. That is in effect now?

A. That lease pertaining to the ice plant is, yes.

Q. How did the packing shed come back to you?

A. I wanted to get out of the ice business and not be held at the ice plant just sitting there. I made a deal with the Ice Exchange whereby they themselves were relieved of any liability for lease money. You see, I was paying money to U. P., and I had a claim against the Ice Exchange for this lease money, I felt. The machinery was being stolen, and I relieved the Ice Exchange from any liability that they might have for rental charges, insurance charges, taxes, and any liability that they might have for the machinery that had been stolen, and they turned

the shed back to me, and I could do as I chose with it so long as I didn't sell it or lease it to a packer who can buy ice from anybody but the Ice Exchange. That is as I recall it.

Q. That is roughly the idea?

A. That is roughly the idea, yes.

Q. When did this happen?

A. This happened this year. I would say, oh, some time in June.

Q. The ice association is still paying you your rental on the ice plant?

A. Yes.

Q. It is closed?

A. Yes.

Q. It was in June, then, when they relinquished any interest they had in this shed?

A. I would say June. Say from May to July; somewhere in there.

Mr. Myers: May I interrupt you just a moment in order that you may have the picture clear?

Mr. Davis: Yes.

Mr. Myers: These negotiations for this transfer back to you of the packing shed started in January of this year and were finally consummated around May or June.

The Witness: This thing had been—oh, it had been going on for a long time. I would say prior to January we were negotiating, more or less. It was before it came to your attention.

Mr. Myers: I didn't mean that it came up in January and was closed out in June. In other words, the returning back to you of that property occurred in about June.

The Witness: Before it got to your attention we had been working on that.

Mr. Davis: Q. This re-transfer or re-conveyance was a written agreement with the ice association?

A. Yes, I think so.

Q. Is that agreement available?

A. Yes.

Q. You say that was written?

A. Yes, I think that was written.

Mr. Davis: Do you know where that is?

Mr. Myers: I drew it, I think. After I signed it I gave it back to Mr. Ord.

The Witness: You were asking me and I was trying to figure where it was. I think it is in my office.

Mr. Davis: Q. What became of the Rarity interests there? What happened?

A. Well, he forfeited whatever interest he might have in it.

Q. When did that occur?

A. That was in 1936.

Q. Did you take any steps to insure the forfeiture? I mean did you give him notice on the forfeiture or enter into any agreement?

A. No.

Q. What happened? Did he just walk off?

A. He just walked off.

Mr. Myers: May I correct something else. The Ice Exchange actually cancelled the contract?

The Witness: Yes, I think they were the ones that did it officially.

Mr. Myers: They cancelled his contract and terminated the contract in which he was to lease and purchase this packing shed due to the fact that he was somewhat in arrears to the Ice Exchange for ice he purchased during the time they operated as a lessor of the plant.

The Witness: That is right.

Mr. Davis: Q. That was around 1936?

A. Yes, sir.

Q. You say the Community Ice caused the machinery to be put in during Osborne's occupancy?

A. Yes.

Q. When was that that the machinery was placed in there?

A. From 1929 until 1932.

Q. What did that consist of?

A. There was an ice crusher and conveyors.

Q. Belt conveyors?

A. No, they were roller conveyors. Motors; loading machinery; box making equipment.

Q. What did that box making equipment consist of?

A. They call them humps.

Q. Did they have transmissions overhead?

A. They have rollers. They have long lengths of rollers. It is possibly as wide as this blotter, about two and a half to three inches in diameter, running across it, and they are spaced at about four inch centers. The box can be made at one end and given a shove, and it would roll either by pressure or by gravity to the other end of the roller. These rollers run 40 to 80 feet.

Q. That is what you meant by the equipment?

A. That is some of the stuff, yes.

Q. What else was there?

A. I have a detail of that.

Q. Roughly, I mean; the general nature of it.

A. Loading equipment to load it into the refrigerator cars.

Q. What was the nature of that?

A. There is a box lidding machine, and steel plates to bring them from the packing shed into the car itself.

Q. You started to tell me and I interrupted you that the stuff was put in over a period of from what time to what time?

A. 1929 to '32.

Q. When was it removed from the packing plant?

A. It was removed—that is, it was officially removed right after I consummated the deal with the Ice Exchange, but it had been taken out piece by piece practically constantly from the time Rarity vacated the building.

Q. When was that?

A. That was in 1936.

Q. When was it completely taken out?

A. Possibly within a week or 10 days or two weeks after I had consummated the deal with the Ice Exchange.

Q. What date are you speaking of?

A. That was the one that—

Q. You mean when you got it back?

A. Yes, when I got it back.

Q. That would be the summer of 1939?

A. Some time between May and July of '39.

Q. What did you do with that equipment?

A. It was stored in the Osborne packing shed in Fullerton. That isn't all the original equipment. The biggest portion of it just drifted away.

Q. Taken out from time to time from 1936 to '39?

A. Children would come in and steal the stuff. That is really the main thing; they would come in and take the stuff away from there, break down the building, come in and take the equipment. I would make a report to the police and I would make a report to the Ice Ex-

change, and that was the end of it. As soon as I had possession of the property I wanted to remove that equipment so I would have something when I had the plant and the packing shed back again at the expiration of this Ice Exchange lease.

Q. You got the ice plant back too in this deal?

A No, I say—maybe you would restate what I said.

Mr. Davis: No. You can tell it over again. I just misunderstood.

A. I said that when the Ice Exchange returned the packing shed to me I knew it was my duty and entirely up to me that if I wanted to have anything, why, I would have to take care of it or else lose it. I had it stored in Mr. Osborne's shed in Fullerton. The reason for that being that I would have some machinery left at the time the Ice Exchange contract expired in 1943. That was it.

Q. What did that which you stored in Mr. Osborne's shed consist of?

A. Well, there is a grinder or an ice crusher, they call it; the ice conveyors; bins—no, bin isn't the word there. Hampers; loading plates; belts, those steel belts; bearings; washing trays, there is a washing tray; spraying equipment; hose. I can't recall anything else.

Q. What I started to ask you a while ago was this: you mentioned motors. You had motors in there?

A. Yes.

Q. How many did you have?

A. I mentioned motors, but most of the motors had been stolen. I had motors in at the time. I think there were either 17½ or 22½ horse power of motors.

Q. About how many were there?

A. There were either three or four.

Q. I may not use the right word. You help me to understand. Did you have any power transmission equip-

ment in there? In other words, how did you transmit your power from your motor to your machines?

A. Two of them were direct connected—three of them were direct connected, and one was a belt drive.

Q. You didn't have any general transmission system then; just a belt drive from the motor to the machine?

A. Yes.

Q. That stuff that you removed to the Osborne shed is still there? It is still in Osborne's shed as far as you know?

A. As far as I know. I believe so. I have never seen it even when it was taken down there. The truck came up and—Harold and I have been friends for a long time.

Q. Harold Osborne?

A. Yes. He sent his truck to my place. They loaded it on and took it up there.

Q. Approximately when was that?

A. Well, as I said, within one to two weeks or a week and ten days after I took over the packing shed.

Q. In May or June of '39. Would that be about right?

Mr. Myers: Some time in between May and July.

The Witness: And July, somewhere.

Mr. Myers: The date of that agreement will show it.

Mr. Davis: Yes.

The Witness: It was within a week or ten days afterward.

Mr. Davis: I may want to see the agreement. As long as he doesn't happen to have any of those originals here we may ask to see it and we may not.

Mr. Myers: If I had known what you wanted I would have brought it with me.

The Witness: We would have brought all that stuff.

Mr. Myers: The letter you sent us was very general. We were just required to be here for an examination.

Mr. Davis: We didn't know they existed so we couldn't have asked you for them.

Mr. Myers: We didn't know what you wanted to talk about.

Mr. Davis: We are trying to get the whole picture so we can put it up to the company.

Q. There was no equipment left in the building after this date in May or June?

A. There was no moveable equipment, no. The electric wiring, the conduit, the switches and things that were part of the building were left, yes. But there was no other moveable machinery left.

Q. Now, the last time, as I understand it, that this place was operated, this shed, was in '36 some time?

A. It was the last time it was operated as a packing shed, yes.

Q. Was it operated for any other purpose after '36?

A. No. It was vacant.

Q. Was there anybody there? Did you have anybody there?

A. No, no one lived there. I used to make a practice of going into it sometimes every day and sometimes every two or three days. I would go through it and look at it and see if everything was all right.

Q. When was the last time you were there before the fire?

A. I believe I was there the morning of the fire. I can't say.

Q. What time did the fire occur?

Mr. Price: 10:00, wasn't it?

Mr. Davis: About 10:00.

Mr. Price: I think it was around there.

Mr. Davis: Q. How about your electrical connections? Was your electricity connected at the time of the fire?

A. No. It had not been connected since Rarity left.

Q. About what time in 1936 did he leave, do you recall?

A. No, I don't. I answered that once before.

Q. Yes. I was getting a little more general idea of whether it was in the spring or fall or winter.

A. I don't really know. Of course, those matters could be looked up; you know that.

Q. Yes. When did you first learn of the fire?

A. You mean that there was a fire there?

Q. Yes.

A. It was probably a few minutes before half past ten on the night it happened.

Q. By the way, where do you live? What is your address?

A. 214 Georgia Avenue.

Q. Where is that with reference to the packing shed that was?

A. I would say five blocks east.

Q. How did you first learn of the fire?

A. How?

Q. Yes.

A. My sister-in-law—two of my sister-in-laws came to the house. They had been working. They have a beauty parlor. They had been working at the beauty parlor. They evidently heard the fire alarm or something and came over to the house and told me my ice plant was on fire. Naturally I went down to see about it.

Q. What was the extent of the fire when you got there?

A. Well, it was practically all gone. The firemen were playing the hose on the front part of the building, on the office part of the building at that time, but it was gone by that time.

Q. I don't know whether I made this clear. You said it had not been occupied as an ice plant. Had it been occupied or used for any other purpose after Rarity left in '36 up to the time of the fire?

A. No. You say occupied. I have been in that place. I have chased tramps out that had been sleeping there, if you mean occupants of that nature.

Q. No.

A. Nobody else has been there to live.

Q. No one has lived there or made any attempt to run any business or do anything of that sort?

A. No, that is true. I have chased tramps out and I have chased children out.

Q. Do you know whether the lead in the electric wires was connected at all?

A. I don't know. I believe not. I don't know. There were no bills for them.

Q. No bills and no juice was on?

A. Not to my knowledge, no.

Q. Was there any other source of fire there?

A. No.

Q. There was no gas?

A. No. The gas meter was disconnected a long time ago. It was shut off. It was not disconnected, I don't believe. I wouldn't say about that, but it was shut off by the gas company. The gas meter was located over near the ice plant, and I am sure that it was shut off.

Q. You feel reasonably sure you were there the morning of the fire?

A. I believe so, yes. I feel reasonably sure.

Q. How often did you go into the building during the period, we will say, after you made this deal?

A. After I acquired it I used to try to go in twice a day. I used to go in the morning. I have a service station, and I would drop over on my way to the service station in the morning and then on my way back from the service station I would drop in and see if everything was all right.

Q. You would do that about every day?

A. Approximately every day, yes.

Q. At what time of the day of the fire did you drop in?

A. Well, I can't swear that I was there in the morning of the fire. It was a custom for me to do that between a quarter past five and 5:30, because I had to leave at 5:30 to be at the service station.

Q. In the evening about what time did you come back?

A. I used to try to get in there along about 4:00 o'clock; 4:30.

Q. Do you think you could refresh your memory enough to know whether you were in the shed the morning of the fire?

A. No, I don't. I was not there the evening of the fire, because I worked late at the service station.

Q. You remember that, do you?

A. I wasn't there in the evening. I got home—it was well after dark when I got home. I don't like to go there after dark.

Q. What openings were there in the building by way of doors and windows?

A. Well, there was only one door that had a key. The rest of the doors were nailed shut.

Q. You spoke of chasing tramps out. What means did they have of getting in?

A. They would loosen the wall of the side of the building and crawl in. That was one of the little jobs I had to do. I used to nail that up pretty frequently.

Q. Was it up and down, California style?

A. Well, it was 1 x 12's nailed up with 1 x 2 or 3 laths.

Q. They would just pull a board out and sneak under?

A. Yes.

Mr. Price: What would be your opinion as to the cause of the fire? Just what opinion did you form?

The Witness: Well, my opinion would be the same as the fire chief. While it is not official or on his record his opinion and mine would be the same. Tramps. They do this; they go under there and they spread out papers and have a drink and lay there, I presume. I have never seen them taking the drinks, but I have seen them afterward and it appeared that they had a drink recently. They built fires.

Mr. Myers: The shed is off the ground so they can get under it?

The Witness: Yes. I have seen debris where a fire had been under the building. I have seen the fires in the box cars. It is just an opinion. I have nothing to back it up with.

Mr. Davis: Can you think of anything else at this time? We may want to get some of these dates definitely.

Mr. Myers: I will be glad to get the ones you want if you will let me know.

Mr. Davis: I know now we ought to have the instrument that creates his title.

Mr. Myers: Yes, that releases it back to him.

Mr. Davis: I don't know what it amounts to.

(A discussion was had off the record.)

Mr. Davis: That is all.

(It was stipulated and agreed by and between counsel that the foregoing examination may be signed before any notary public, with the same force and effect as though read, corrected and signed in the presence of the notary public before whom it was taken.)

....

MINNIE MAY ORD,

having been first duly sworn, deposed and testified as follows:

Examination

By Mr. Davis:

Q. Mrs. Ord, we are going to try to save some time. You have heard answers that Mr. Ord has given to my questions as well as his voluntary statements?

A. Yes.

Q. Is there anything that he said that if you were asked you would give a different answer to?

A No, I don't think so.

Q. Is there anything that you noticed he said that you believe he might have been mistaken in as to the dates or time?

A. No, I don't. I know so little about it. I am never around the ice plant or the packing shed.

Q. All right. If I asked you the same questions I asked him you would give the same answers?

A. I probably couldn't give them as well.

Q. As to things of which you had knowledge, of course.

A. Yes.

Q. After all, if you have to sign this examination under oath and when you do sign it, you make his statements your statements, and if when it is presented to

you you see anything you want to correct I want you to correct them.

A. I don't think I could answer it any differently.

Mr. Davis: I think that is all.

(It was stipulated and agreed by and between counsel that the foregoing examination may be signed before any notary public, with the same force and effect as though read, corrected and signed in the presence of the notary public before whom it was taken.)

....

Admitted, marked Defendants' Exhibit "2" [Tr. 77].

SUPPLEMENT "B".

STATEMENT OF ROBERT B. ORD AND MINNIE MAY ORD

Supplement to Examination Under Oath of October 11, 1939, With Reference to Fire of July 15, 1939.

To Property Described in Policy #182233 of the Reserve Underwriters.

May 21, 1927, real estate consisting of east 100 feet, lots 5 and 6, block 69, Clearwater Addition, was deeded to H. G. Flint, C. S. Thompson, Minnie May Ord and R. B. Ord. On this the ice plant was erected. A partnership, doing business under "Community Ice Company" was formed between H. G. Flint, C. S. Thompson, Minnie May Ord and R. B. Ord. On September 10, 1934, C. S. Thompson sold his interest to Robert B. Ord, and Minnie May Ord, and presumably deeded the real estate. The Bill of Sale was recorded October 4, 1934, book 13025, page 136. This left Flint only one-fourth's interest and Mr. and Mrs. Ord three-fourth's. The co-partnership had leased from the Los Angeles and Salt Lake Railway the property along a railroad spur and had erected the vegetable packing shed. This had been sold to H. J. Osborne, doing business as "Hynes Packing Company" on contract, but on March 9, 1933, Hynes Packing Company executed a Bill of Sale to the Community Ice Company of this packing shed, equipment contained therein and the garage on the northeast corner of this building, all on the siding or railroad land.

January 3, 1933, the Community Ice Company, a co-partnership, executed a contract to sell the packing shed to J. W. Rarity, by the terms of which Rarity was to purchase ice from the Community Ice Co. and a surcharge 50¢ per ton, and when 16,000 tons had been purchased, was to become the owner of the shed and receive Bill of Sale thereof. It was provided that he was not to buy ice from others than the Community Ice Company.

May 21, 1933, the Community Ice Company executed an option and lease to Ice Exchange Corporation of Los Angeles the ice plant, ice storage shed, equipment and the packing shed and assigned the contract with Rarity, provided that the Community Ice Company should not go into the ice business for the term of the lease, 10 years, and provisions for Robert B. Ord to act as manager, which was exercised on May 29, 1933.

On March 23, 1936, Ice Exchange, Incorporated, gave notice of intention to forfeit Rarity contract, and on April 2, 1936, gave Rarity notice that the contract was forfeited. Rarity continued to occupy the ice shed until May 17, 1936, when he abandoned the same.

On March, 1936, Los Angeles and Salt Lake Railroad executed lease to Flint and Mr. and Mrs. Ord as Community Ice Company for the site where the packing shed was located at an annual rental of $77.94, for a term of 5 years from January 1, 1936, to January 1, 1941. This lease gave permission and required the lessee to remove all structures within 30 days from the termination of the lease.

May 20, 1938, John Frederick, Jr., through court procedure, acquired all the interest of Flint in the partnership and partnership property, and on July 12, 1939, by Deed and Bill of Sale, conveyed to Robert and Minnie May Ord, all of his interest in said property, which included the packing shed and equipment and Ice Exchange lease.

On June 30, 1939, Robert B. and Minnie May Ord, doing business as Community Ice Company, entered into a written modification of the lease agreement of May 21, 1933, whereby Ice Exchange paid Community Ice Company the sum of $1100.00 in compromise of claim for insurance and loss of equipment from packing shed and other items, and the Ords released $600.00 per year for the balance of the leasehold term on the lease and Ice Exchange, Inc., released and conveyed to the Ords the packing shed in question together with the equipment, with the proviso that the Ords could not lease or use the shed for packing purposes unless ice used therein was bought from Ice Exchange, Inc., and in event the building was torn down, could not use either the equipment or salvage for packing shed purposes in San Bernardino, Riverside, Orange or Los Angeles County.

On or before July 8, 1939, Mr. and Mrs. Ord, doing business as Community Ice Company, removed, as more fully explained in the examination under oath, all equipment from the shed to the packing shed of H. J. Osborne, at Fullerton, California, for storage, where the equipment now is.

Dated: Nov. 20, 1939.

ROBERT B. ORD.
MINNIE MAY ORD.

State of California, County of Los Angeles—ss.

On the 20th day of November, 1939, before me, Gerald Willis Myers, a notary public in and for said county, personally appeared R. B. Ord, and Minnie May Ord, known to me to be the persons whose names are subscribed to the within instrument and acknowledged that they executed the same.

Witness my hand and official seal.

GERALD WILLIS MYERS,
Notary Public in and for the County of Los Angeles, State of California.

Admitted, marked Defendants' Exhibit "3" [Tr. 87].